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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 08-13555 (JMP)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.,

Debtors.

- - - - -x

U.S. Bankruptcy Court
One Bowling Green
New York, New York

August 23, 2010
9:32 AM

B E F O R E:
HON. JAMES M. PECK
U.S. BANKRUPTCY JUDGE

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EVIDENTIARY HEARING re 60(b) Motions.

Transcribed By: Clara Rubin and Lisa Bar-Leib

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P R O C E E D I N G S

THE COURT: Be seated, please. Good morning. Welcome back.

MR. BOIES: Good morning, Your Honor.

THE COURT: What's the plan for the day?

MR. BOIES: Your Honor, we have one -- David Boies, for Barclays. We have one brief housekeeping matter, which is a stipulation that admits certain exhibits which, with the Court's permission, I will hand up.

THE COURT: That'd be fine.

(Pause)

THE COURT: I'll just take it. Thank you.

MR. BOIES: And then I think we are prepared to begin with the -- Barclays' case. And we have our first witness here, who is Mark Shapiro. And with the Court's permission, I would call Mr. Shapiro to the stand.

THE COURT: Okay. At some point during the day, I'd be interested in just a plan for the week so I have an idea what to expect each day. We don't have to do that now.

MR. BOIES: Right.

THE COURT: Maybe we can do that at an appropriate break.

MR. BOIES: Okay. We will --

THE COURT: Okay?

MR. BOIES: -- Your Honor.

1 THE COURT: Thank you.

2 Mr. Shapiro? Please raise your right hand.

3 (Witness duly sworn)

4 THE COURT: Be seated, please.

5 DIRECT EXAMINATION

6 BY MR. BOIES:

7 Q. Good morning, Mr. Shapiro.

8 A. Good morning.

9 Q. Would you begin by telling the Court a little bit about
10 your background? You are a lawyer by training, are you not,
11 sir?

12 A. I was trained as a lawyer. I went to school -- law
13 school, and I practiced at Shearman & Sterling right after law
14 school from 1986 through the time I left, which was in 2002.

15 Q. And what did you do in 2002?

16 A. I left the firm -- left Shearman & Sterling where, as a
17 partner, I had been recruited into Lehman Brothers, who was
18 looking to start a restructuring group on the investment
19 banking side.

20 Q. In September of 2008, were you still at Lehman?

21 A. Yes, I was.

22 Q. And what was your position there?

23 A. I was head of the restructuring group within the
24 investment banking division.

25 Q. And what is your current position?

1 A. Well, after the Lehman bankruptcy, I was offered a
2 position at Barclays, which is essentially the same position I
3 had at Lehman, which was the head of restructuring within
4 investment banking at Barclays Capital, and that's the position
5 I hold today.

6 Q. I'd like to take you back to September of 2008, in
7 particular to September 12 of 2008, and ask you whether at that
8 time you learned that there was a serious risk that Lehman
9 would file for bankruptcy?

10 A. September 12th was Thursday?

11 Q. No, I think September 12th was a Friday.

12 A. Friday. Okay. So I first learned about the possibility
13 that there could be a problem on Thursday late afternoon from
14 Mark Schaffer, who called me away from a meeting that I was at
15 at Kirkland & Ellis where I was negotiating a DIP facility to
16 come back to the firm to talk about what might need to happen
17 over the course of the next few days.

18 Q. And what did you do when you returned to the firm on
19 September 11th?

20 A. I went to Mark Schaffer's office.

21 Q. And then what happened?

22 A. They asked me to think about what we might have to do in
23 the event that a deal couldn't be consummated outside of court
24 with one of the bidders that was -- that were in discussions
25 with the firm at that point, and obviously said, you know, it

1 is possible that bankruptcy might have to occur in the event we
2 can't get a deal consummated over the weekend.

3 Q. And in response to that, what did you then do?

4 A. I said that's going to be a disaster, and basically said
5 okay, well, let me start to think about how we might approach
6 this. They told me I wasn't able to talk to anybody else, with
7 the limited exception of a few people within the firm, because
8 they were afraid of the confidentiality of the issue. And, so,
9 basically I said I needed to understand the Lehman balance
10 sheet, try to understand kind of what the whole firm looked
11 like, you know, where the assets were with the liabilities,
12 just to get a sense of what might be able to be accomplished.
13 And so I started on a fact-finding mission essentially to
14 get -- gather in facts.

15 Q. Now, you said that your initial reaction was that
16 bankruptcy would be a disaster. Can you explain why you felt
17 that way?

18 A. Well, we were talking about one of the largest broker-
19 dealer investment banks in the world going bankrupt and that's,
20 you know, by definition going to be a very, very difficult
21 situation for the firm. Obviously there were inherent systemic
22 risks around it. And so, you know, my general view was it's
23 going to be a very bad outcome if this happens.

24 Q. And did you come up with any plan to try to deal with
25 those potentialities?

1 A. Well, not initially. Initially I just started to figure
2 kind of what the firm looked like, and hoped that they would be
3 able to get to an out-of-court deal. I really didn't believe,
4 actually, that Lehman would actually go bankrupt, because it
5 just seemed like something that was not going to be allowed to
6 happen. But ultimately after I did that fact-finding, which
7 really started late Thursday night when I got some information
8 from some people who had -- who were in position of information
9 around the corporate chart, essentially, and understanding what
10 the whole corporate structure looked like, and then by Friday I
11 had started to think about what might have to happen and what
12 we might want to be doing in the event that this became an
13 eventuality.

14 Q. And what did you conclude were the options?

15 A. Well, I thought that the only -- if we were going to go
16 into bankruptcy, which I viewed, frankly, as a -- you know, try
17 to avoid it all cost, I basically told everyone, you know, 'We
18 should avoid bankruptcy at all cost. Whatever deal you have to
19 do out of court you should do, because it's going to be better
20 than a bankruptcy.' That being said, obviously we didn't
21 control our own destiny in many ways.

22 And so when I, you know, was really thinking about what we
23 might do, it seemed to me that the only way that the firm would
24 be able to survive as a going concern would be to potentially
25 sell it in some kind of a bankruptcy sale process.

1 Q. And did you present the possibility of a bankruptcy sale
2 process to people within Lehman Brothers?

3 A. Yes, I did.

4 Q. When did you do that?

5 A. Friday night.

6 Q. And what was their reaction?

7 A. Well, I explained that we could potentially sell the firm
8 in, you know, a 363 sale, it would have to be done very
9 quickly, in my view, and it would need the support of the
10 regulators, who would obviously have to be supportive of
11 whoever was buying it. And when I showed -- or told them about
12 this idea, they said 'Well, we're talking about a bankruptcy,
13 right?' And I said 'Yes, that's a bankruptcy.' And they said
14 'Well, we don't want to do a bankruptcy.' And I said 'I
15 understand. This is a backup plan.' And so really it didn't
16 get much traction.

17 Q. Now, you say that if you were going to do a 363 sale, it
18 would have to be done very quickly. Why was that?

19 A. Because I didn't -- you know, financial -- I've been
20 involved in a number of large financial firm bankruptcies, and
21 they don't tend to last very long in terms of the going
22 concern: People leave; it becomes very, very difficult to
23 control the situation. And so it was my view as a twenty-plus
24 year bankruptcy professional that, you know, the only way that
25 you can get a deal done that would maintain the going-concern

1 business would be to do something reasonably quickly.

2 Q. Now, you indicated that Lehman was at this time trying to
3 avoid bankruptcy. How were they trying to avoid bankruptcy?

4 A. Well, I wasn't really involved but, based on what I had
5 learned, they were in discussions with Barclays and with Bank
6 of America to try to effectuate some kind of a transaction.
7 But, again, I really wasn't privy to the details of those
8 transactions.

9 Q. Did there come a time when you understood that neither of
10 those transactions were going to take place?

11 A. I guess -- well, yeah, I mean, at different points in
12 time. I guess, on Saturday there was a lot going on down at
13 the Fed, and I was not somebody who had gone down to the Fed.
14 And a group came back from the Fed and said that Bank of
15 America had just purchased Merrill. And so as a result, I
16 figured, okay, well, that's obviously the end of, you know,
17 Bank of America purchasing Lehman. And so it appeared to me
18 that we were down to Barclays at that point. And then
19 obviously there was discussions going on at the Fed, which
20 seemed like it was mostly being choreographed by the Fed, not
21 by the people at Lehman, over the weekend. But on Sunday
22 morning, we learned -- I learned from someone who came running
23 down the hall at Lehman that morning that the Barclays deal was
24 not approved by the English regulators.

25 Q. Now, after you learned that the Barclays deal was not

1 going to proceed on Sunday, September 14th, what did you then
2 do?

3 A. Well, I was in Tom Russo's office. Tom Russo was the
4 chief legal officer and he was -- I guess I would call him the
5 consigliere to Fuld. And so we were trying to figure out what
6 to do next. We -- he was very close to some of the regulators
7 and organized a call to talk about what the consequences of a
8 Lehman bankruptcy might mean. And so we ended up getting on a
9 call with, at the time, Tim Geithner, Chris Cox from the SEC,
10 some staff people. And it was Tom Russo, myself and Dick Fuld
11 talking to them about what might happen here.

12 Q. And when was this call?

13 A. It was probably either late morning or around lunchtime on
14 that Sunday.

15 Q. Okay. And what occurred on that call?

16 A. Dick Fuld said 'I have Mark Shapiro here. He's our
17 restructuring professional. He's going to talk a little bit
18 about what might happen here in the event that, you know, we
19 are forced to file for a bankruptcy.' And then I got on and I
20 said 'I believe this is going to be Armageddon. I think that
21 there's no precedent for this and that this is going to be a
22 disaster.' And we got no response. Then Dick Fuld said 'This
23 is not about Lehman anymore. This is about the global
24 economy.' Again, we got, really, no response back. And
25 basically the conversation was reasonably quick and ended

1 without, I'd say, any meaningful feedback from that group.

2 Q. And what was the next thing that you did?

3 A. Well, we had a subsidiary in London, and the subsidiary in
4 London was funded by the U.S. company LBI. And so we needed to
5 figure out what to do there, because they had their own board
6 meetings going on with their own counsel, and they were dealing
7 with the trading law and solvent issue under English law.

8 Q. And what did you end up doing there?

9 A. I ended up in contact with the internal lawyer who I knew
10 who -- he and I were having discussions, and he needed to know
11 was there still a chance that we would avoid bankruptcy,
12 because, if there wasn't, then he needed to advise that board
13 that they needed to put themselves into an administration under
14 U.K. law.

15 Q. And what did you respond?

16 A. Well, we held out hoping that maybe sometime between,
17 let's call it, noon and what eventually was probably around
18 4 o'clock, we would find some alternative solution to
19 bankruptcy. When none appeared, Tom Russo and I called him
20 back and said 'It doesn't appear that there's any savior here
21 for us. You'll have to do what you have to do.' And so they
22 put -- they then put the U.K. company into administration.

23 Q. And with respect to what was happening in the United
24 States, during that Sunday of September 14th, did you return to
25 your 363 sale idea at all?

1 A. Later in the day, yes.

2 Q. When was that?

3 A. That was -- well, I guess -- at about 5 o'clock we had an
4 internal meeting amongst most of the senior people, maybe fifty
5 senior people that had been flown in from all over the world,
6 to talk about what was happening, and I was asked to present
7 briefly what was going to happen in the coming days. I had the
8 corporate chart; I explained to people we were filing the
9 holding company but we were not going to file any other
10 companies in hope that we would figure something out maybe in
11 the interim.

12 Q. And what did you do next after that?

13 A. So when that meeting broke up, which was, I'd call it,
14 sort of morgue-like, because obviously, you know, everybody --
15 it was so uncertain as to what would happen; everyone was being
16 wiped out of much of their net worth, losing their jobs. You
17 know, obviously a very somber meeting. And at the end of that
18 meeting, there were a few of us who kind of hung around, and I
19 believe it was Kevin Genirs, who was the internal counsel at
20 investment banking, said to me, 'You know, Mark, you had this
21 idea about selling the firm. Have you talked to Bart about
22 it?'

23 Q. And what did you respond?

24 A. I said 'No, I hadn't.'

25 Q. And what happened after that?

1 A. He said 'We should go down to Bart's office and talk to
2 you' -- you know, 'You should go down to Bart's office and talk
3 to him about it.'

4 Q. And did you do that?

5 A. I did.

6 Q. And what did you say to him and what did he say to you, in
7 substance?

8 A. I knew Bart because our kids had gone to Rye Country Day
9 School together, so I knew him a little bit, and so I felt
10 comfortable going into his office. And I said 'I have this
11 idea. I think we can still sell the firm to a buyer, and maybe
12 Barclays wants to buy it.' And I gave him a thirty-second
13 synopsis of what 363 was.

14 Q. And then what did Mr. McDade do?

15 A. He said 'Let's call Diamond.'

16 Q. And did he call Mr. Diamond in your presence?

17 A. Yes, he did.

18 Q. And what did Mr. McDade say to Mr. Diamond?

19 A. He said 'I have Mark Shapiro here. He's a restructuring
20 person who works here at Lehman and he thinks, you know, that
21 you guys can buy us in a bankruptcy sale. Are you interested?'

22 Q. And did Mr. Diamond give a response at that time?

23 A. Well, he wasn't on speakerphone, so I didn't hear the
24 response. I only could infer the response from what Bart said.
25 But basically it sounded like he essentially said he needed to

1 call somebody, and then Bart hung up and said 'He said he'll
2 call me' -- 'He needs to call someone. He'll call us back in
3 fifteen minutes.'

4 Q. And did you remain in Mr. McDade's office?

5 A. I did.

6 Q. And did a call come back?

7 A. Yeah, it did.

8 Q. And were you still in Mr. McDade's office when that call
9 came back?

10 A. Yes, I was.

11 Q. And as a result of that call from Mr. Diamond, what
12 happened?

13 A. Bart reported that Diamond called back, and it was a very
14 short call, and he said 'We want to do this.' He said 'We want
15 to do this. Let's meet at your firm at 7 a.m. tomorrow
16 morning. I'll have our team there; you have your team there.'

17 Q. Now, prior to the time that Mr. McDade and Mr. Diamond
18 agreed to meet the following morning, had you retained any
19 outside bankruptcy counsel?

20 A. Yes.

21 Q. Who did you retain?

22 A. I didn't retain them, but Steve Berkenfeld had retained
23 Weil Gotshal.

24 Q. And where -- when were they retained?

25 A. I'm not exactly sure. I believe they were retained either

1 Wednesday or Thursday. I'm not positive when exactly they were
2 retained.

3 Q. Prior to the conversation between Mr. McDade and Mr.
4 Diamond we're talking about, had you had any meetings with Weil
5 Gotshal?

6 A. Yes.

7 Q. When did you have meetings with Weil Gotshal?

8 A. I had a phone call with them on Friday, very -- you know,
9 just sort of introductory. It was with Shai Waisman and Lori
10 Fife. And then we met on Saturday, because they had prepared
11 petitions. And I had also instructed them on Saturday to start
12 working on a motion -- on a 363 motion on the off-chance that
13 maybe we could do something with somebody.

14 Q. Okay. Now, as of the time that Mr. McDade and Mr. Diamond
15 were talking Sunday night, September 14th, had Lehman retained
16 an investment banker in connection with the bankruptcy?

17 A. When -- as of the time I spoke to Bart?

18 Q. Yes.

19 A. No.

20 Q. Did there come a time when Lehman Brothers did retain an
21 investment banker?

22 A. Yes.

23 Q. When was that?

24 A. Later that evening.

25 Q. And did you play any role in that?

1 A. Yes.

2 Q. What role did you play?

3 A. Well, we were standing right after the board had met, and
4 that -- I guess an hour, or maybe an hour or so, after the
5 board had met, and I said to Skip McGee who was there, 'You
6 know, we can't be our own investment bankers in a bankruptcy,'
7 because I don't think people fully appreciated that. You know,
8 very often when investment banks do their own deals, they are
9 their own banker.

10 Q. And what was the response?

11 A. He said 'Oh, okay.' And I said 'I think we should
12 bring' -- 'We need to bring somebody in to do this.'

13 Q. And did he agree?

14 A. He said 'Yes, we should. What do you think?'

15 Q. And who was brought in?

16 A. Well, initially I suggested Art Newman at Blackstone, who
17 I knew extremely well and have a high regard for, and he had
18 played the role in other large financial institution
19 bankruptcies. And so I called Art to see if he was free and
20 his firm, you know, could do it.

21 Q. And did you ultimately -- did Lehman ultimately retain
22 him?

23 A. No, we did not.

24 Q. Why not?

25 A. Because Lazard -- in betw -- by the time he called me

1 back, Skip came back to me and said, 'You know, we had brought
2 Lazard in to work on the SpinCo transaction and they were
3 giving a fairness opinion. I feel like I have an obligation to
4 them to at least offer them this opportunity. Since we haven't
5 paid them anything in regards to that transaction, we should
6 give them an opportunity to earn a fee.'

7 Q. And what was the SpinCo transaction that you refer to?

8 A. That was -- the firm had put together its commercial real
9 estate in one entity and it was going to either try to spin it
10 off to shareholders or sell it to a third party. I was not
11 involved with it.

12 Q. And Lazard had been the investment banker for Lehman in
13 that proposed transaction?

14 A. There was a banker named Gary Parr, who I personally
15 didn't know, who apparently was involved in that transaction at
16 the time, yes.

17 Q. Okay. And he was from Lazard?

18 A. Correct.

19 Q. Now, did Lehman Brothers ultimately retain Lazard in
20 connection with this bankruptcy and the 363 sale?

21 A. Yes. So after we had this conversation, Skip and I, he
22 said 'Let's go back to my office and let's call Lazard and see
23 if they can do this.' And so he put in a call to Gary Parr,
24 who then got Terry Savage on the phone, because Terry is
25 someone that I've known well over the years. I explained -- we

1 explained to them what was going on, and they said that they
2 would be interested, they would like to do it and that -- Terry
3 said he couldn't personally deal with it that evening but that
4 he would send Barry Ridings, his partner, into our office that
5 evening, which ultimately happened.

6 Q. So Mr. Ridings came to the Lehman offices Sunday night --

7 A. Correct.

8 Q. -- September 14?

9 A. Probably around 10 o'clock, yeah.

10 Q. And did you know Mr. Ridings before then?

11 A. I had worked on one transaction with him years before,
12 Owens Corning, but we weren't -- I didn't know him nearly as
13 well as I knew Terry Savage.

14 Q. And what was Mr. Ridings' position with Lazard?

15 A. He and Terry ran their restructuring group.

16 Q. And had he had personal experience with any financial-firm
17 bankruptcies previously to this one?

18 A. I didn't know. You know, I only knew Terry through Owens
19 Corning, so I didn't really exactly know what he had worked on
20 before that.

21 Q. Did you later find that out?

22 A. Well, in the course of those few days, we talked a little
23 bit about Drexel, because he had been -- I didn't realize he
24 had been a managing director of Drexel. So we did chat a
25 little bit about that. I think it was a little bit of deja-vu

1 for him.

2 Q. And what was the charge or assignment that was given Mr.
3 Ridings and Lazard?

4 A. Well, as the investment bank for Lehman Brothers, this --
5 you know, the bankrupt, they were going to give whatever
6 advice -- whatever financial advice was necessary in the
7 context of whatever was going to happen next. And obviously
8 what happened next was a potential sale, and so they became
9 intimately involved in the sale process.

10 Q. And with respect to the potential sale, what was their
11 charge or assignment?

12 A. Well, basically Barry said he needed to review the whole
13 transaction. He was around the negotiations that took place,
14 basically starting on Monday. He was there sort of side by
15 side with us for most of the negotiations. Obviously there
16 were some that took place without him, but most -- he was
17 around in the hallway virtually the entire forty-eight hour
18 period, talking to us about different issues. And then
19 subsequent to that, he and his team did diligence around the
20 book of securities that was purporting to be sold by
21 Barclays -- by Lehman to Barclays. So we organized diligence
22 for him around that.

23 Q. And when did that take place?

24 A. I guess -- that probably started on Tuesday. Yeah,
25 probably started on -- the diligence part started on Tuesday, I

1 would say, or Wednesday maybe even, and went through the end of
2 the week.

3 Q. Now, on the morning of Monday, September 15th, did Mr.
4 Ridings work at Lehman Brothers?

5 A. He was there. I don't recall exactly what he was doing,
6 but he was there.

7 Q. Did he have anybody with him?

8 A. He had one associate with him, yes.

9 Q. And did you play any role in taking Mr. Ridings to various
10 places and people within Lehman Brothers?

11 A. I did, and I actually delegated to one of the people who
12 works for me the task of trying to organize meetings for him
13 with different people on different desks so he could do the
14 work he needed to do.

15 Q. And did you go with him to any of those people and desks?

16 A. I think I may have sat through maybe one of the meetings,
17 but mostly I didn't sit through those meetings. There were
18 other things that were going on that I was dealing with.
19 There -- I definitely remember being in one meeting.

20 Q. Now, in addition to meeting with Lazard the morning of
21 September 15th, did you attend any meetings with other people
22 related to the sale process?

23 A. Yeah, well, the first meeting that took place was the
24 7 a.m. meeting I referred to earlier, which was basically
25 between a number of us on the Barclays side, myself, Bart

1 McDade, Skip McGee, Mark Schaffer, Weil Gotshal; and Barclays'
2 team, which was Archie Cox, Michael Klein, who was their
3 advisor; and a group of lawyers from Cleary. And that was the
4 7 a.m. meeting.

5 Q. And then was there a meeting after that that you
6 participated in?

7 A. Well, there were many meetings after that. We basically
8 did a marathon negotiating session from that point all the way
9 through about 9 to 10 o'clock Tuesday night. I didn't leave
10 the firm through that whole period. In fact, I didn't leave
11 the thirty-second floor through that whole period.

12 Q. As of September 15th, the Monday, what was the basic
13 structure of the deal that was being discussed?

14 A. The basic structure was -- we didn't know what Barclays
15 was prepared to buy. We knew what we had to sell. So that
16 meeting was really a -- you know, a meeting where we said, you
17 know, 'Here's how you do this.' We laid out a path of both (a)
18 the magnitude of what they might be able to buy, which included
19 the buildings, included potentially securities, obviously
20 making an offer to the people; those kinds of categories of
21 things to buy as a business. And obviously they were
22 interested in buying the business, not specific assets
23 necessarily. And at the same time, we were talking about
24 timing, because obviously timing was critical. And so we
25 had -- you know, we had some discussion around how to get this

1 done if -- you know, if we were going to get it done, how to
2 get it done.

3 Q. What was said about timing?

4 A. We laid out -- he was asked -- sorry. Harvey Miller, who
5 obviously was the lead lawyer for Weil Gotshal in the deal, was
6 asked by -- I think it was Archie, you know, 'How long will
7 this take to get done?'

8 Q. And when you say the "timing was critical", what do you
9 mean by that? Why was it critical?

10 A. Because the firm was imploding. There were -- if -- you
11 know, when I looked at my BlackBerry, there were messages of,
12 you know, 'It's been nice to know you.' People were leaving
13 right and left. There were -- I was told stories. Again, I
14 was not -- I never left the thirty-second floor, but my
15 colleagues did, and they were saying how there were people
16 carrying boxes out of the firm. There was obviously news all
17 over. It was -- you know, it was one of these chaotic
18 situations in terms of the people, and it seemed to me that it
19 was unlikely that the firm was going to last very long under
20 those circumstances.

21 Q. Now, who were the lead negotiators for Lehman in this
22 process?

23 A. Bart McDade, our president, was the guy who really led the
24 nego -- the overall negotiations. No decision got made without
25 basically Bart being involved in that decision.

1 Q. And what was your role in those negotiations?

2 A. You know, it really depended on the matter. You know, it
3 was -- obviously multiple things were happening at the same
4 time. So we had contract negotiations going on, we had
5 specific deal points that were going on. So I was trying to
6 handle principally the bankruptcy issues. And I also felt some
7 responsibility as a bankruptcy former lawyer to make sure I
8 read the contract and understood what the deal was and made
9 sure as best I could that the business deal was being reflected
10 in the documents. So I'd say, you know, I viewed my role as
11 one of trying to shepherd this through to get to a consummated
12 transaction.

13 Q. And who was the lead negotiator or negotiators for
14 Barclays in the process?

15 A. The people that I personally dealt with were Archie Cox
16 and Michael Klein on the business side, and Victor Lewkow on
17 the legal side.

18 Q. And in the negotiations, were there disagreements between
19 the Barclays side and the Lehman side?

20 A. Yes.

21 Q. Can you give me some examples?

22 A. Sure. We disagreed on what they were going to pay for the
23 buildings. They wanted to pay less than what we were telling
24 them we thought they should pay. They wanted to appraise the
25 building on an unoccupied basis. We disagree -- we had

1 discussions about the breakup. I -- they had asked for a much
2 higher breakup fee than I thought was appropriate under the
3 circumstances. We had disagreements about -- or I had a very
4 long, heated argument with Michael Klein about cure and how
5 that worked. He didn't seem to get what cure meant. And I was
6 insisting that they take all the cure costs, and he didn't
7 really appreciate what that meant and so he was -- he got
8 angry; I think that was his response to not understanding. And
9 so we had a number of disagreements through the night. Those
10 all happened, by the way, in the middle of the night, you know,
11 anywhere between 1 and 4 a.m. So people were also tired.

12 Q. Now, with respect to the disagreement over the real estate
13 as to whether it should have been valued as an occupied -- or
14 on an occupied basis or an occupied basis, how was that
15 resolved?

16 A. Ultimately we believed, on the Lehman side, that it should
17 be valued on a fully occupied basis, because they were getting
18 a building that was going to be filled with the people at
19 Lehman Brothers. So, again, I was not the principal negotiator
20 who resolved that point. I was there while it got discussed,
21 but ultimately I believe Schaffer and Archie Cox resolved it
22 where Archie agreed that it would be appraised -- there would
23 be an agreed appraisal; each side would do their own appraisal
24 and then they would come to some kind of a view on an occupied
25 basis -- fully occupied basis.

1 Q. You said there was a disagreement that you participated in
2 with respect to a breakup fee, is that correct?

3 A. That's correct.

4 Q. And what was that disagreement and how was it resolved?

5 A. It was a disagreement between myself and Victor Lewkow
6 where they had said that they wanted a 250 million dollar
7 breakup fee. I said I thought that that was too high in light
8 of the transaction and the speed of the transaction and that I
9 thought that we should focus on trying to get to a deal as
10 opposed to trying to give them the protections of a large
11 breakup fee. And so we had a back-and-forth probably over the
12 course of about an hour on that. And ultimately I persuaded
13 him that a hundred million dollars plus a twenty-five million
14 dollar fee reimbursement was a reasonable amount, and he
15 ultimately agreed to that.

16 Q. From your perspective, were the negotiations between
17 Barclays and Lehman at arm's length and in good faith?

18 A. Yes.

19 Q. Did you see any indication that anybody on either the
20 Lehman side or the Barclays side were acting in anything other
21 than in the interests of the company that they were
22 representing?

23 A. No, I did not. We all did the best we could under the
24 circumstances.

25 Q. Now, there's been some testimony in this trial that Lehman

1 had made offers to a small group of top Lehman executives. Was
2 that widely known at the time?

3 A. I heard about that on Tuesday that they had offered a few
4 people, you know, sizable contracts.

5 Q. Did you have any understanding as to why that was being
6 done?

7 A. Yes.

8 Q. And what was that understanding?

9 A. Because they were buying a business that's a very
10 complicated large-scale investment bank and they needed the
11 people who were running it to run it, and the only way they
12 could get them to run it was to get those people signed up.

13 Q. Did you see any indication that any of the people that had
14 been offered jobs by Barclays were in any way not fulfilling
15 their obligations to Lehman?

16 MR. GAFFEY: Objection, Your Honor. It calls for a
17 legal conclusion. I understand he's a lawyer, but he's still
18 not competent to address the ultimate issue on that, Your
19 Honor.

20 THE COURT: I'll sustain the objection for the reasons
21 stated, and perhaps also for another reason, which is he's
22 being asked to surmise state-of-mind issues rather than
23 objective behavioral issues, and it's so general a question
24 it's tough to answer.

25 Objection sustained, but you're certainly free to

1 rephrase it any way you wish.

2 MR. BOIES: Thank --

3 MR. GAFFEY: Your Honor, just --

4 I beg your pardon.

5 -- just while there's a brief break. I have a hearing
6 issue. Could I ask that the microphone be pulled a little
7 closer to the witness? I'm having a hard time hearing Mr.
8 Shapiro.

9 THE WITNESS: Is this better?

10 THE COURT: Mr. Shapiro --

11 MR. GAFFEY: Thank you.

12 THE COURT: -- please speak into the microphone. And
13 I'll note that there's a jackhammer outside as well.

14 MR. GAFFEY: And I changed the batteries in my hearing
15 aid, but it's not helping, Your Honor.

16 THE WITNESS: I'll do my best, Your Honor.

17 BY MR. BOIES:

18 Q. Mr. Shapiro, at any time in the negotiations, did you see
19 any indication that any of the Lehman employees were taking any
20 actions that were not, in your view, in Lehman's best interest?

21 MR. GAFFEY: Same objection, Your Honor.

22 THE COURT: Well, did he see any indication -- let me
23 just look at the question again.

24 That objection's overruled.

25 Can you repeat the question?

1 Q. At any time in the negotiations, did you see any
2 indication that any of the Lehman employees were taking any
3 actions that were not, in your view, in Lehman's best interest?

4 A. No.

5 Q. Now, you indicated that you ultimately joined Barclays; am
6 I right about that?

7 A. That's correct.

8 Q. When did you decide to join Barclays?

9 A. I think it was about two weeks into October.

10 Q. Let me turn to the subject of the APA. And when did
11 you -- well, let me back up. Were you -- did you participate
12 in the drafting of the APA?

13 A. The physical drafting? I didn't actually type any words
14 or -- but I did look at it; I did mark it up from time to time,
15 depending on the section that we were dealing with, yes.

16 Q. That is, you participated not in the typing of it but in
17 the negotiations that led to it, is that what you're --

18 A. Yeah, there was a room on the thirty-second floor filled
19 with lawyers from both Cleary, Sullivan & Cromwell, and Weil,
20 and those lawyers were working on obviously what was ultimately
21 the APA. And we were all waiting around for the first draft
22 and, when the first draft came, we all started reading it and
23 giving them input on whatever we knew to be, you know, on
24 agreement on specific points.

25 Q. And did you ultimately read the entire APA at some point?

1 A. Multiple times. In fact, the last -- I don't know if the
2 last time, but one of the times it was the middle of the night;
3 it was probably about 5 a.m. when whatever draft came out. And
4 we were all very tired. And I remember then Steve Berkenfeld
5 showed up and I said 'I'm glad you're here because I'm getting
6 pretty tired and I'm glad to have another set of eyes looking
7 at this.'

8 Q. Now, did the APA, as filed with this Court, in your view
9 accurately disclose the basic economic structure of the sale as
10 you understood it?

11 A. Yes, it did.

12 Q. And what was the basic economic structure of the sale, as
13 you understood it?

14 A. Well, Barclays was buying the North American business of
15 Lehman. It was not buying anything outside of North America;
16 they chose not to, even though they were offered that
17 opportunity. Obviously it would have been more complicated
18 because they were also in their own bankruptcy proceeding. So
19 it was limited to the North American businesses. Those
20 businesses included fixed income, equities, investment banking;
21 I think, ultimately the personal wealth business as well. And
22 so they were buying that business as a going concern,
23 effectively, with -- you know, making offers to all the
24 employees, and then buying the buildings to house the people
25 that they were making offers to, obviously: the building in

1 New York, the building -- the data centers in New Jersey. And
2 they were buying other assets that were being used in the
3 operation of the business, which obviously included the
4 securities that ultimately are in -- you know, are part of this
5 dispute.

6 Q. Were there certain assets that were specifically excluded
7 from the purchase?

8 A. Yes, there were.

9 Q. Except for the assets that were specifically excluded from
10 the purchase, was Barclays acquiring all of the assets used in
11 the business?

12 A. That was the intent, yes.

13 Q. And was that intent, as you understood it, expressed in
14 the APA?

15 A. Yes, it was.

16 Q. Now, did the APA provide for an appraised value for all
17 the purchased assets?

18 A. No.

19 Q. Why not?

20 A. It was very chaotic, as you can imagine, trying to figure
21 out how to sell a multibillion dollar investment bank in a, you
22 know, very short period of time and identifying what exactly we
23 had to sell. So it was a difficult exercise to actually figure
24 out what it is that we actually could convey to Barclays.

25 Q. What was the consideration set forth in the APA, as you

1 understood it?

2 A. I'd have to -- is there a copy of the APA in here? I'd
3 have to look at it specifically.

4 Q. It's, I think, behind your Tab 2. It's BCI Exhibit number
5 1.

6 A. (Pause). So I'm looking at Section 3.1, which is the
7 consideration section, and what it says is the aggregate
8 consideration shall be the cash amount, which is equal to 250
9 million dollars, the assumption of assumed liabilities. And
10 then you had also the appraised value of the building in New
11 York City as well as the data centers in New Jersey. And we
12 said -- again, this was really illustrative at the time, but we
13 said that we expected that the total cash amount, which
14 included all the things I just described, would be
15 approximately 1.7 billion dollars, and that was based on a
16 rough 1 billion dollar expected appraisal of the building in
17 New York City.

18 Q. Now, in addition to the 1.7 billion dollars of expected
19 cash, there was, you said, certain assumed liabilities, is that
20 correct?

21 A. That's correct.

22 Q. And was there an appraised value for those assumed
23 liabilities?

24 A. No.

25 Q. Why not?

1 A. There were, I guess, a couple reasons; one is there was
2 no -- again, no way to ascertain what that could exactly be.
3 We didn't have precise numbers to work with at the time.
4 Things were moving very quickly. We were trying to get to a
5 contract. So we categorized things in the normal way that you
6 do it in an asset purchase agreement of this nature. But there
7 wasn't a specif -- we didn't have specific numbers necessarily
8 associated with everything we put in the contract.

9 Q. Were the assumed liabilities defined expressly in the APA?

10 A. Yes, they were.

11 Q. And why was that?

12 A. If you give me a minute, I'll try to find them. (Pause).
13 Section 2.3, it's titled "Assumption of Liabilities"; that's
14 the section that dealt with the assumed liabilities, and that
15 of course was subject to the excluded liabilities.

16 Q. And as you understood it, was Barclays assuming only the
17 liabilities that were expressly identified in the APA?

18 A. That's correct. In a normal bankruptcy deal, buyers do
19 not want to take on liabilities, obviously, that are not
20 specifically enumerated. And this would -- you know, this was,
21 I would call it, the standard operating procedure for what --
22 you know, what an asset purchase agreement would be like in a
23 bankruptcy sale -- in a 363 sale.

24 Q. Did the APA provide for a balance sheet deal?

25 A. No, it did not.

1 Q. Why not?

2 A. Well, we didn't have a good balance sheet to work from to
3 begin with, and that was not the nature of what we were trying
4 to negotiate.

5 Q. Did the APA provide representations or warranties as to
6 asset values?

7 A. No, it did not.

8 Q. Why not?

9 A. We wouldn't give -- we wouldn't have given them that.

10 Q. Did the APA have a true-up provision?

11 A. It had a provision that gave some limited sharing to the
12 Lehman -- to Lehman in the event that Barclays was going -- was
13 making money on certain securities that it was purchasing. I'd
14 have to find it.

15 Q. Was that true-up provision ultimately taken out?

16 A. Yeah. It's -- it was Section 3.3 in the asset purchase
17 agreement, called "Adjustment to Cash Amount", and that was
18 subsequently removed under the clarification letter.

19 Q. You mentioned that there was uncertainty about the
20 securities that Lehman had. Can you explain why that was?

21 A. Well, we were dealing with a moving -- I mean, you're
22 dealing with a trading operation, so, by definition, things are
23 changing all the time. And we didn't have a good snapshot of
24 exactly what it was that we could sell to them. We knew that,
25 as a result of the bankruptcy, particularly on Monday and

1 Tuesday, we were getting -- the firm was getting blown out of
2 positions. I was told that people were, you know, terminating
3 trades, people were grabbing collateral. You know, there were
4 things that, you know, we didn't have knowledge of that were
5 just happening as we were dealing with the deal. And so I was
6 afraid, truthfully, that Barclays would not close because we
7 were not able to convey to them what we originally said we were
8 going to be conveying to them, and I wanted to be as careful as
9 we could to get to a deal that was actually a deal that we
10 could close on and not one that they would walk from.

11 Q. When you say that Lehman was being blown out of positions,
12 can you explain what you mean by that?

13 A. Well, you know, on every trade there are counterparties,
14 and obviously bankruptcy of a holding company often would be an
15 event of default under the relevant documentation, whether it's
16 a swap or whether it's a -- some other kind of financial
17 transaction. And so people were closing out trades right and
18 left, as I was told by people on the trading side with Lehman.
19 And so people were having a very hard time getting a handle on
20 ultimately what we could convey to Barclays is a pool of
21 securities.

22 Q. And when you were closed out of trades -- when Lehman was
23 closed out of trades, what was the consequence of that to
24 Lehman?

25 A. I guess it would depend -- I don't really have specific

1 knowledge of any specific trades that I could tell you about.

2 Q. Were you familiar with what happened at the CME?

3 A. I think I heard about it, but I didn't have any direct
4 participation in it.

5 Q. Okay. Let me ask you to direct your attention to the APA
6 where it talks about the value of various assets or the
7 reference value of various assets. And if you look at the long
8 positions and the seventy billion dollar -- can you do that?

9 A. You're talking about the definition of purchased assets, I
10 think?

11 Q. Yes.

12 A. Yes, purchased assets.

13 Q. Now, at the time that the APA was being negotiated, did
14 you understand that there was a difference or buffer between
15 the value of the trading assets being transferred and the value
16 of the associated trading liabilities that were being assumed?

17 A. Yes, there was a difference.

18 Q. And what was the amount of the buffer, as you understood
19 it from the APA?

20 A. It's somewhere around a billion to a billion and a half;
21 in that neighborhood.

22 Q. And that was the difference there between the seventy
23 billion dollars and the sixty-nine billion dollars, is that
24 correct?

25 A. That's correct.

1 Q. Now, in addition to that --

2 A. The -- you know, we obviously said approximately seventy
3 billion dollars, because we didn't have the exact number. We
4 were all working off of, as I said, again, a moving target.
5 And so we used "approximately". But my recollection was, in my
6 mind, it was around seventy; again, something around sixty-
7 nine.

8 Q. And in addition to that difference, was there a portion of
9 the buffer that was made up by what was referred to as retained
10 cash?

11 A. Well, there were other things in the contract that
12 Barclays was entitled to receive under the asset purchase
13 agreement.

14 Q. And was one of those retained cash?

15 A. Yes. They were entitled to receive 1.3 billion dollars of
16 cash.

17 Q. And did the APA make clear that the retained cash was in
18 addition to the approximately seventy billion dollars that is
19 referred to here?

20 A. Yeah. It's a separate item in Section A. It's
21 specifically enumerated as "the retained cash", which is
22 defined somewhere as 1.3 billion.

23 Q. Now, in addition, you say Lehman was transferring to
24 Barclays a number of other assets. Can you give me some
25 examples of those other assets?

1 A. Well, all the assets that are described in the purchased
2 assets section, going from A through S.

3 Q. And --

4 A. And the obviously that got changed through the
5 clarification letter on Friday and through the weekend, I
6 guess.

7 Q. And did you understand that there were certain assets that
8 were being transferred to Barclays that might have value --
9 substantial value to Barclays but did not have significant
10 value to Lehman Brothers?

11 A. Yes.

12 Q. And why was that?

13 A. Because Barclays was now going to buy it as a going
14 concern. So things like intellectual property, indices,
15 trading tools -- you know, all of those things were things that
16 were valuable to a business like Lehman Brothers as an
17 operating business. In a liquidating firm, none of those
18 things would have had value other than, you know, what I'll
19 call either scrap value, or maybe you could sell it to someone
20 for cents on the dollar.

21 Q. Now, was Barclays also acquiring residential real estate
22 mortgage securities?

23 A. Yes, they -- we called them resis (ph.), yes.

24 Q. Resis. And was the resis in addition to the so-called
25 seventy billion dollar number?

1 A. Yes. Subclause (e) sets out the fact that we agreed that
2 they would be -- have -- they would have the right to purchase
3 fifty percent of each position in the residential real estate
4 mortgage pool.

5 Q. Now, did you have an estimate of what the total difference
6 or buffer was if you took into account the trading assets and
7 trading liabilities together with the retained cash and the
8 residential real estate mortgage securities?

9 A. Did I have a view at that time --

10 Q. Yeah.

11 A. -- or do I have a view now?

12 Q. At that time.

13 A. You know what --

14 Q. Did you try to make an estimate?

15 A. -- to be honest, we really didn't focus on that; at least
16 I didn't really focus on that at the time. That really wasn't
17 all that relevant to me what their, you know, subsequent,
18 quote, "buffer" was. It was really about what was the deal;
19 are we documenting it to the best of our abilities, accurately;
20 and are we going to get the deal closed, consistent with the
21 timing constraints we were under.

22 Q. And why did you think the amount of the buffer or
23 difference between the asset and liability numbers was not
24 relevant to what you were doing?

25 A. Because we did the best deal we could do under the

1 circumstances, you know, and that was -- you know, my goal was
2 to do the best we could do and to try to get it consummated.

3 Q. Now, do you know where the seventy billion dollar number
4 that's in the APA came from?

5 A. It came from the trading side of the firm at some point; I
6 don't recall specifically exactly when or from whom.

7 Q. Did you know whether it came from the accounting system,
8 from the book value, from --

9 A. Well, it came from the finance group, and things were
10 moving around quite a bit, as you can imagine. So that -- and
11 that's why it says "approximately", because, you know, it was
12 not a precise number.

13 Q. Now, there's a reference to this as having a book value of
14 approximately seventy billion dollars; do you see that?

15 A. Yes, I do.

16 Q. Where did the book value description come from?

17 A. I don't recall exactly where it came from, but I think the
18 intent was to reflect what we believed were the market value of
19 the securities at the time from Lehman's perspective -- or from
20 Barclays' and Lehman's perspective.

21 MR. GAFFEY: Move to strike everything after "I don't
22 remember exactly where it came from," Your Honor.
23 Nonresponsive.

24 THE COURT: I'm not going to strike it. He said what
25 he believed, and that's probably based upon something in his

1 brain. So I'm going to accept it as his testimony. What
2 weight is to be given we'll determine later.

3 Q. Did you have, yourself, any personal knowledge about the
4 exact source of the seventy billion dollar number?

5 A. No.

6 Q. Did you understand that there was an effort to resolve
7 what you referred to as the uncertainty caused by the market
8 movement during that week -- during --

9 A. Sorry, I'm not sure I understand your question.

10 Q. You mentioned that there was uncertainty as to the values
11 because of the market movements during the week. Do you recall
12 that generally?

13 A. It was not just market movements. It was a combination of
14 the market moving -- obviously no one -- you know, that week
15 was obviously one of the most volatile weeks in the history of
16 the financial world. So, you know, ascertaining values was not
17 going to be easy, number one. Number two is, as I said before,
18 we were getting blown out of position, so we didn't know
19 exactly what we would be left with when the dust settled. So I
20 think -- hopefully that answers your question.

21 Q. And was there an attempt to resolve those kind of issues
22 during the week, that is, to figure out what was going to be
23 left and what the values were going to be?

24 A. Yeah. Obviously no one wanted to get to a point where we
25 were obligated to convey, you know, a group of securities to

1 Barclays that we couldn't convey. Things were changing through
2 the week. The traders were obviously monitoring everything
3 that was going on, and there was definitely Barclays people and
4 Lehman people continuing to work throughout that week on, you
5 know, reviewing the securities that were to be conveyed.

6 Q. Let me turn to the subject that you mentioned before,
7 which were cure payments. And you said you'd had a
8 disagreement with Mr. Klein about cure payments; do you recall
9 that?

10 A. Yeah.

11 Q. As you understood it, did the APA make clear that Barclays
12 would pay cure payments only for contracts that it chose to
13 assume within sixty days after the closing?

14 A. That's correct.

15 Q. And was that necessarily an uncertain amount?

16 A. By definition, it's an uncertain amount because cure
17 payments are payments you make only to the extent that you
18 assume and assign a contract, and obviously we didn't know
19 exactly what Barclays was going to be assuming. My presumption
20 going into it was that they were going to need most of the
21 contracts to run the business. Obviously it was a very, very
22 large business. And Barclays did not have a substantial
23 business in the U.S. at that point in time. And so my general
24 presumption was that they were going to need to cause most of
25 the contracts to be assumed and assigned over to them.

1 Q. Was there any limitation in the APA as to which contracts,
2 if any, Barclays had to assume?

3 A. Not that I remember.

4 Q. Was which contracts Barclays assumed left to Barclays'
5 sole discretion, as you understood it?

6 A. Yes. And I personally negotiated that part of the
7 contract and essentially said to them 'You're going to need
8 some time to figure this out. We'll give you sixty days. I
9 want you to pick up all the cure costs; we don't want the
10 estate to be having to do that. I also want you to pick up all
11 the costs associated with what happened post-filing. So to the
12 extent that sixty day goes (sic) by or even more time goes by
13 and you haven't assumed or rejected the' -- 'caused us to
14 assume or reject the contract, you need to pick that up as a
15 post-petition admin claim,' to which they ultimately agreed.

16 Q. Now, were you present at the September 19th hearing before
17 the Court?

18 A. Yes. I was sitting over in that windowsill right over
19 there (pointing).

20 Q. And do you recall that the Court was told that the cure
21 amounts had a potential exposure of 1.5 billion dollars?

22 A. Yes, I do.

23 Q. And did you have an understanding of what "potential
24 exposure" meant there?

25 A. Yeah. I think it's reasonably common parlance within a

1 bankruptcy 363 sale to understand that if a buyer is being
2 given the opportunity to select which contracts it will take,
3 and it has agreed to pick up the cure costs, that it's a --
4 it's an amount that's not clear, but it could be as much as a
5 specific number. And that, by the way, was an estimated
6 number, and it was a number that we had gotten -- you know, we
7 had gotten to very, very quickly.

8 Q. And did that estimated number of what the maximum exposure
9 could be change over time?

10 A. Not in my mind it didn't, but I know that I have -- I
11 subsequently saw references to a higher number, but I didn't
12 know where that came from.

13 Q. Let me turn now to the question of compensation and what
14 Barclays assumed with respect to compensation for transferred
15 employees.

16 A. Okay.

17 Q. What did the APA provide, as you understood it, that
18 Barclays had an obligation to assume in terms of compensation
19 for transferred employees?

20 A. If you give me one second, I'll just look at the agreement
21 again; unless someone has a specific section. I don't know if
22 you have a specific section to refer me to.

23 (Pause)

24 Q. I might suggest 9.1(b) --

25 A. Yeah.

1 Q. -- and 9.1(c).

2 A. Yeah, that's what I'm looking -- so I'm looking at Section
3 9.1. And essentially the intent was that Barclays would offer
4 all of Lehman's North American employees employment. They
5 would have ninety days to decide whether those people were
6 going to be essentially permanently -- you know, made a
7 permanent offer; they would have to pay severance to those who
8 they didn't, and they would have to compensate those who did,
9 consistent with -- in paragraph (c), consistent with what the
10 expectation would be -- was at the time for 2008 annual
11 bonuses. And they agreed to a two billion dollar total number
12 for 2008 compensation, which was intended, in my mind, to
13 include the severance that was covered by this and the bonuses
14 that was covered by this.

15 Q. And what was that amount?

16 A. Two billion.

17 Q. And was that two billion dollars an estimated number?

18 A. You know, I was given that number by Bart McDade. I don't
19 know exactly how it was derived at the time.

20 Q. Now, there's been some testimony in court about whether or
21 not Barclays expected to book an accounting gain on the
22 acquisition of the Lehman assets. At the time that you were
23 negotiating the APA and the deal thereafter, did you have an
24 understanding one way or the other as to whether Barclays would
25 or would not expect to book an accounting gain on the

1 transaction?

2 A. I had no understanding of whatever Barclays' accounting
3 was whatsoever.

4 Q. As far as you were concerned in terms of what you were
5 doing on behalf of Lehman, was that relevant to what you were
6 doing?

7 A. No, it wouldn't have been relevant to what I was doing at
8 the time, no.

9 Q. Why not?

10 A. How Barclays accounted for the transaction was not of any
11 import to either the asset purchase agreement or the
12 transaction commercially.

13 Q. As you understood it at the time that you were
14 participating on behalf of Lehman and negotiating this
15 transaction, was Barclays undertaking a substantial risk in the
16 acquisition?

17 A. I would say yes. At the time, absolutely.

18 Q. Why is that?

19 A. Because we were in the -- one of the most uncertain weeks
20 in the history of the financial industry. They were buying a
21 bank that was going through a bankruptcy; it wasn't clear
22 exactly how it was all going to come out. And financial
23 acquisitions generally have not worked out terribly well for
24 most buyers. So I would say they were assuming a fair amount
25 of risk, yeah.

1 Q. Did there ultimately come a time when a sales motion was
2 prepared and submitted to the Court?

3 A. Yes.

4 Q. What was your role in the preparation of the sale motion?

5 A. I reviewed it with Weil Gotshal, gave them my comments,
6 and then we filed it.

7 Q. In your book, there should be a Tab 15 that has BCI
8 Exhibit number 11.

9 A. Yep, I have it.

10 Q. And is this the document that you're referring to?

11 A. This is the motion, correct.

12 Q. And this was, as I understand your testimony, drafted by
13 Weil Gotshal, but you participated in it and gave comments?

14 A. Yes, I did.

15 Q. Let me take you through some of these statements in here,
16 and I want to ask you about them. First, at the time the sale
17 motion was submitted to the Court, did you believe that what
18 was stated in the sale motion was true and accurate and fair?

19 A. Yes.

20 Q. And do you still today believe that what is stated in the
21 sale motion was true and fair and accurate at the time it was
22 made?

23 A. Yes, although I haven't re-read it word for word. I've,
24 you know, glanced at it in preparing for this, but -- so I
25 would say yes, it's consistent with what we had filed,

1 obviously, at the time; it reflects the accuracy of the
2 information that we believed existed at the time, yes.

3 Q. Let me ask you to look at paragraph 6 of the sale motion,
4 which says "The sale of the Purchased Assets" -- and this is
5 the sale of the purchased assets to Barclays, is that correct?

6 A. That's correct.

7 Q. It says "The sale of the Purchased Assets is critical to
8 the stabilization of value each day that the Purchased Assets
9 are subject to the vagaries and vicissitudes of the
10 marketplaces, and the impact of bankruptcy diminishes the value
11 of such assets. Time is of the essence." Do you see that?

12 A. Yes, I do.

13 Q. And did you believe that that was accurate at the time?

14 A. Yes.

15 Q. Why was that?

16 A. Because the firm was -- you know, I think Harvey Miller
17 characterized it best as a melting ice cube. It was a melting
18 ice cube. People were looking for other jobs. People were not
19 doing -- you know, necessarily doing all the jobs that they had
20 to do; people were -- it was a state of flux. And it was clear
21 to me that, you know, every day that passed, we were running
22 the risk that, you know, the firm -- you know, we wouldn't be
23 able to accomplish the sale and that the firm would end up
24 getting liquidated and that the overall value of the firm would
25 be diminished.

1 Q. Let me ask you to look at the second sentence of paragraph
2 8 where it says "The Proposed Sale will maximize the value of
3 the Purchased Assets and avoid rapid erosion of their value."

4 Do you see that?

5 A. I do.

6 Q. And did you believe that was accurate at the time?

7 A. Yes, I did.

8 Q. And do you believe that is still accurate today?

9 A. Yes, I do.

10 Q. Why is that?

11 A. We had no other buyer. We had one buyer. No one else was
12 showing up. It was a very, very difficult week, as I
13 previously described. Values were in flux in a negative way.
14 And it wasn't clear whether any of the other broker-dealers
15 would survive as well. And so at that point in time, the
16 sale -- you know, selling the firm as a going concern was going
17 to be the -- you know, create the most value we could create
18 under the circumstances.

19 Q. Let me ask you to look at the last sentence at paragraph
20 10, which says "The Sale will relieve LBHI of exposure based
21 upon its guarantees of many of LBI's obligations." Do you see
22 that?

23 A. I'm sorry, where are you looking at?

24 Q. The last --

25 A. Paragraph 10?

1 Q. The last sentence of paragraph 10.

2 A. "The Sale will relieve LBHI of exposure based upon its
3 guarantees of many of LBI's obligations."

4 Q. And did you believe that was true at the time it was
5 written?

6 A. Yeah, I believed that there were many transactions, trades
7 and other things that LBI had entered into as the broker-dealer
8 that LBHI had been required to guarantee as the parent. And
9 so, effectively, I guess that sentence was really talking about
10 the fact that LBHI, to the extent that things were being taken
11 over or assumed, would be relieved from its obligations.

12 Q. Let me ask you to look at paragraph 17, which deals with
13 breakup fee, and in particular the second sentence of paragraph
14 17 --

15 A. I see it.

16 Q. -- where it says "The Proposed Sale is unique because of
17 the fragile and highly vulnerable nature of the Purchased
18 Assets." Do you see that?

19 A. Yes, I do.

20 Q. And did you believe that was true at the time?

21 A. Yes, I did.

22 Q. And do you believe that's still true?

23 A. Yes, I do.

24 Q. Why is that?

25 A. Lehman Brothers was the largest broker-dealer to go

1 bankrupt in the history of the world. And so you had a
2 situation of a financial firm that, you know, requires the
3 confidence of the market, which it lost, obviously. And at
4 that point, the employees were potentially scattering to the
5 winds and the assets were in a state of flux, and people were
6 taking action against those assets. And the sooner we could
7 stabilize the situation, you know, in my mind and in the mind
8 of others, the greater value we were going to create --
9 greatest value we were going to create and greatest
10 stabilization we would create.

11 Q. Let me ask you to look at paragraph 11, and the next to
12 last sentence where it is said that "It is urgent to sell the
13 Purchased Assets now or face material disruption of their
14 value."

15 A. Um-hum.

16 Q. You see that?

17 A. Yes.

18 Q. Can you explain why that was true?

19 A. Well, for the same reasons: The absence of a sale would
20 have led to, you know, a near-term liquidation, whatever you
21 want to call that, which would have consequently ended up where
22 assets would have been disposed of piecemeal and potentially
23 under, you know, much more -- even at much more adverse
24 circumstances. And so there was obviously an urgency at that
25 point to sell these assets and sell the business. And really

1 we were selling the business, not just assets. No one looked
2 at this as just a pure asset sale. This was sale of Lehman
3 Brothers' North American businesses.

4 Q. And I think you said they were selling all of the assets
5 related to those businesses, except those that were
6 specifically excluded, is that correct?

7 A. That's correct.

8 Q. Let me ask you to look at paragraph 14 of the sale motion,
9 and in particular, like, the third bullet. It says "Purchase
10 Price and assumed liabilities", do you see that?

11 A. I do.

12 Q. And it talks about future liabilities under assigned
13 contracts and leases; do you see that?

14 A. Yes, I do.

15 Q. And was part of the consideration that Barclays was giving
16 their assumption of these future liabilities of running the
17 business?

18 A. Yeah, to the extent that they were going to have contracts
19 assumed and assigned over to them by the debtor, yes, they
20 would have been relieving the debtor of those obligations.

21 Q. Now, let me ask you to look at paragraph 28, and this
22 talks about cure amounts and it talks about contracts that may
23 be assumed; do you see that?

24 A. Yes, I do.

25 Q. And it talks about two categories of contracts: the

1 closing date contracts, and the designated contracts.

2 A. Yes, I see that.

3 Q. And the first category, the closing date contracts, is
4 comprised of those contracts that the purchaser requires be
5 assumed and assigned on the closing date; do you see that?

6 A. I do.

7 Q. And the purchaser there is Barclays, correct?

8 A. Correct.

9 Q. And why did Barclays require that certain contracts be
10 assumed and assigned on the closing date?

11 A. I'm not really privy to why they thought that, but I
12 believe that there were certain contracts that were ultimately
13 more important to them in terms of making sure that they had
14 those contracts in hand when they closed.

15 Q. Were these the so-called mission critical contracts?

16 A. I've heard that term before. Yeah.

17 Q. And then the remaining contracts are the ones that they
18 have the sixty days to decide whether to assume, is that right?

19 A. Yeah, there were -- when we -- you know, when we started
20 this, there were potentially thousands of contracts. I really
21 had no idea how many contracts were -- you know, Lehman
22 Brothers as a firm and the U.S. was a party to. And so we just
23 tried to put together a structure that would give them ample
24 time to figure out what they were going to take, and make them
25 pay for whatever they were going to take post-petition; so

1 they -- while they were taking their time doing it, they had to
2 pick up those costs and, if they took a contract, they had to
3 pay the cure costs. That was the basic structure, which is
4 consistent with what most of the deals I've worked on in my
5 career have required.

6 Q. Now, you attended, you said, the September 19th hearing?

7 A. Yes, I did.

8 Q. And I want to ask you some questions about that. Did you
9 believe, as you sat there, that the Court was being given a
10 fair description of the status of the negotiations and the
11 deal?

12 A. Yes, I did.

13 Q. And let me direct your attention to a portion of where Mr.
14 Miller says -- this is BCI Exhibit 49A --

15 A. I'm sorry, what tab should I be looking at?

16 Q. Tab 3, I believe, has this. And it is at page 43, line 14
17 of this transcript that is Exhibit 49A.

18 A. Okay.

19 Q. And --

20 A. Yeah, I see it.

21 Q. And at line 14, Mr. Miller says, "In any event, Your
22 Honor, as we described last Wednesday, there are a lot of
23 moving parts to this transaction, and they've been moving with
24 great velocity over the last days since Wednesday. And as a
25 consequence, Your Honor, there has" -- "had to be some major

1 changes in the transaction, and unfortunately they were not" --
2 "weren't finalized until about half an hour ago."

3 And did you participate in those changes that had occurred
4 in the days since Wednesday?

5 A. This is now on Friday, I believe, right?

6 Q. Yes.

7 A. Okay, so I was in Bart McDade's office immediately before
8 the hearing -- before leaving for the hearing. I probably left
9 his office somewhere between 3 and 4 o'clock, from what I
10 remember. And there were changes that were being discussed in
11 his office that -- and we were talking about them. Truthfully,
12 really he was dealing with them with Alex Kirk for the most
13 part, because they had to do with the securities and I really
14 wasn't the -- you know, the principal person around that set of
15 issues. And so I heard some of what was going on. Then I left
16 to take the train down to come down to the courthouse. And
17 then the next thing I heard was the testimony -- or the
18 presentation that was being given by Mr. Miller.

19 Q. Did you believe, at the time, that the transaction that
20 the Court was being asked to approve was the best transaction
21 that was available to Lehman?

22 A. Yeah, it was the best available to us under the
23 circumstances, yes.

24 Q. And why was that?

25 A. Because we had no other transaction to do -- or to compare

1 it to, or any alternative other than not to have a transaction.

2 Q. And did you believe, based on the negotiations that had
3 occurred, that the consideration that Barclays was paying
4 constituted reasonably equivalent value or fair value for the
5 purchased assets?

6 A. It would be viewed by me as the best we could do under the
7 circumstances. How you characterize it exactly I'm not sure,
8 but it was the best we could on an arm's-length basis, you
9 know, in a forty-eight hour negotiation.

10 Q. As you understood it, was the deal that Barclays and
11 Lehman negotiated a deal where Barclays acquired the assets
12 free and clear of any liens or liabilities?

13 A. Absolutely.

14 Q. And why was that important?

15 A. Because that's the way you do a bankruptcy deal: You
16 acquire assets free and clear of liens, claims and
17 encumbrances. And if you don't do it that way, you run the
18 risk that you're going to find problems later.

19 Q. And as you understood it, was Barclays' assumption of
20 liabilities limited to those expressly set forth in the
21 purchase agreement?

22 A. Yes, they were.

23 Q. And, again, why was that?

24 A. For the same purpose I just enumerated: that buyers do
25 not take on liabilities in a bankruptcy sale unless they're

1 expressly laid out in the contract.

2 Q. Did you believe, at the time that this deal was being
3 negotiated, that Barclays would have done the deal if it had
4 believed it would be subject to post-closing litigation,
5 challenging the valuations of any of the assets?

6 MR. GAFFEY: Objection. Foundation.

7 THE COURT: What's the foundation objection?

8 MR. GAFFEY: No foundation that he has any idea what
9 Barclays' intent or thoughts or desires were, Your Honor. He's
10 being asked what Barclays thought.

11 THE COURT: Sustained.

12 Q. In the course of your negotiations -- in your
13 participation in the negotiation with Barclays, did you form a
14 view from what Barclays said -- not trying to read their mind
15 but from what Barclays said and did, as to what their
16 understanding of the deal was?

17 A. Did I understand what Barclays' understanding of the deal
18 was?

19 Q. Yes.

20 A. I would -- I don't think I had anything other than the
21 asset purchase agreement to go by.

22 Q. And as you understood the asset purchase agreement, did
23 the asset purchase agreement permit anyone, creditors'
24 committee or anyone else, to challenge any of the valuations
25 after the deal had been approved by the Court?

1 A. Not to the best of my knowledge, no.

2 MR. BOIES: Your Honor, if this would be a convenient
3 time to take the morning break, I would like to just sort of
4 review where I am. I'm about done, and I wanted to see whether
5 there are any questions that I have.

6 THE COURT: Fine. Let's take a fifteen minute break,
7 resuming at 11:05.

8 MR. BOIES: Thank you, Your Honor.

9 (Recess from 10:51 a.m. until 11:09 a.m.)

10 THE COURT: Be seated, please.

11 MR. BOIES: Your Honor, I have no more questions.

12 MR. GAFFEY: May I proceed, Your Honor?

13 THE COURT: Yes. Do I get a book, or --

14 MR. GAFFEY: Yes, you do, Your Honor; two.

15 Robert Gaffey for -- Jones Day, for the -- from Jones
16 Day, for the debtor, for the record, Your Honor.

17 Your Honor, I have two books, and one I -- I want to
18 explain; I have one for the witness that's related to Mr.
19 Shapiro. We're also going to -- for this phase, we've
20 collected in what's just called "Witness Binder" a set of
21 documents that come up time and time again. So I've said to
22 Mr. Boies, regardless of what he takes back and forth, he may
23 want to keep that one handy, and I'll say that to Your Honor as
24 well. This witness binder is sort of a core set of documents.
25 So there are two.

1 THE COURT: Okay, that's fine.

2 MR. GAFFEY: And if I can hand those up?

3 THE COURT: Absolutely. Thank you.

4 (Pause)

5 CROSS-EXAMINATION

6 BY MR. GAFFEY:

7 Q. Mr. Shapiro, we haven't met. My name is Bob Gaffey. I'm
8 from Jones Day. We represent the debtor.

9 Now, Mr. Boies asked you a bit about your background, sir,
10 as a restructuring lawyer. I just wanted to follow up a bit on
11 that. In your time at Shearman & Sterling, was your practice
12 concentrated in the restructuring and bankruptcy area?

13 A. Yes, it was.

14 Q. And among the things that you did in your practice before
15 Lehman Brothers was deal with such things as motions for
16 approval of 363 sales, correct?

17 A. Yeah, I worked for debtors sometimes; I worked for
18 creditors other times; I worked for buyers sometimes. So I did
19 all of those different things.

20 Q. And one of the things that you understood from your time
21 at Shearman & Sterling and your other involvement in
22 restructuring practices is that one key issue with regard to
23 363 sales is disclosure of the facts to the Court that is being
24 asked to approve the sale, correct?

25 A. Of course.

1 Q. And several times in response to Mr. Boies' questions, you
2 mentioned that there was no alternative or only one buyer, or
3 Lehman was doing the best that it could here. Do you recall
4 generally those answers?

5 A. Yes, I do.

6 Q. And you don't mean to suggest with those answers that the
7 fact that there's only one buyer would in any way diminish or
8 dilute the disclosure obligations the parties had to the Court
9 with respect to the 363 sale we're talking about, would you,
10 sir?

11 A. No, I do not.

12 Q. You understood at the time that you were working in
13 connection with the 363 sale here that disclosure was a
14 critical element of the process that needed to be followed in
15 order to obtain approval?

16 A. Like every case, disclosure is required to the Court so
17 that the Court has a full appreciation for what the transaction
18 is before it signs the order approving it. Absolutely.

19 Q. All right. And you spoke a bit toward the end of your
20 testimony about the finality of 363 sales, that is, that the
21 buyer obtains property free and clear of liens and
22 encumbrances; do you recall that?

23 A. Yes, I do.

24 Q. All right. And one of the elements needed to get that
25 favor of finality, that freedom from liens and encumbrances, is

1 to ensure that full disclosure is made of the facts and
2 circumstances surrounding the transaction, yes?

3 MR. BOIES: Objection. Legal conclusion, Your Honor.

4 MR. GAFFEY: I think he opened the door, Your Honor.

5 THE COURT: That's -- excuse me?

6 MR. GAFFEY: I think Mr. Boies opened the door to that
7 with some of his questions on direct to Mr. Shapiro.

8 THE COURT: Well, it -- that's possible. I think that
9 it's true that it does call for a legal conclusion. And it's
10 conceivable that this witness is in a good position to answer a
11 question like that given his background and the position that
12 he held at Lehman Brothers, but I'll sustain the objection.
13 And you can try to ask the question a different way.

14 MR. GAFFEY: I'll rephrase it, Your Honor.

15 Q. In connection with your work on this transaction, the
16 review of the APA, your conversations with Mr. McDade, your
17 negotiations with Mr. Lewkow, it was your view at the time,
18 sir, that if the ultimate goal here included finality, freedom
19 of liens and encumbrances for Barclays, that one price to be
20 paid for that finality was full and complete disclosure to the
21 Court?

22 A. I wouldn't characterize it that way. I would say that in
23 every deal -- this deal is no different other than the fact
24 that we were obviously going very, very fast, which happens
25 sometimes, and this deal was obviously -- involved a very large

1 company in a very difficult time, you know, in our economic
2 crisis. That being said, I look at the totality of what was
3 done, which was a combination of the disclosures that were made
4 orally to the Court both on Wednesday and on Friday, the papers
5 that were filed with the Court, the papers that were filed
6 after the court hearing, including the clarification letter.
7 So when I look at, you know, how do you get to a final order,
8 all of the things that are required to ultimately inform the
9 Court, and other constituencies as well, all of which I believe
10 were all done consistent with the law and consistent with our
11 obligations as the debtor, you know, created a final order, in
12 my mind.

13 Q. Now, the clarification letter that you just mentioned,
14 sir, the fact of the matter is you had nothing to do with the
15 drafting of the clarification letter, correct?

16 A. Absolutely correct.

17 Q. The fact of the matter is you were out of town over the
18 weekend when the clarification (sic) was finalized, is that
19 correct?

20 A. That's correct. I knew about the clarification letter on
21 Friday, because there was some discussion that the deal was
22 going to need to be changed and that the parties were going to
23 evidence that through a letter, that was not ready yet, that
24 would have to be worked on either, you know, through the
25 balance of Friday evening or potentially later. And then I

1 left after the hearing on Friday.

2 Q. And you learned about the fact -- the existence even of a
3 draft clarification letter, sitting in this court at the sale
4 hearing, correct?

5 A. Correct. I might have heard about -- I don't think it was
6 called a clarification letter, but I might have heard that they
7 were working on a document. But I don't recall it being called
8 a clarification letter in Bart's office Friday afternoon. Then
9 I heard about the clarification letter for the first time in
10 court, correct.

11 Q. And you were not involved in its drafting, correct?

12 A. No, I was not.

13 Q. And its contents in any way, correct?

14 A. No. Not in a --

15 Q. The decision --

16 A. Not in a direct way, no.

17 Q. Okay. And you were not involved, were you, sir, with any
18 decision as to whether to file that clarification letter at a
19 point before or after the Court issued its sale order, were
20 you?

21 A. No. As you indicated, I -- the court hearing ended at
22 about 1 a.m., as Your Honor may recall; it was a late night.
23 And I then took the car home and then took a nap for about
24 fifteen minutes, and then went to the airport and caught a
25 flight to California.

1 Q. And the question that I think I asked is you were not
2 involved, sir, in any decision as to whether the clarification
3 letter should be brought to the Court before or after the sale
4 hearing was --

5 A. No. As you said, I was not involved in the clarification
6 letter at all.

7 Q. All right. Now, one of the -- on your direct testimony,
8 sir, you described yourself as being involved in shepherding
9 this through. Do you recall that?

10 A. Yes, I do.

11 Q. Okay. There was a time when you applied different
12 descriptions to your work on the transaction, including being a
13 quarterback of the transaction, is that correct?

14 A. Yeah, I mean, I would call all of those kinds of things,
15 you know, general descriptions of what someone's doing who is
16 helping to get a transaction completed.

17 Q. You have described to others as having been an architect
18 of the sale process, is that right?

19 A. I think I may have called myself an architect in that I
20 had the original idea for it.

21 Q. Have you described yourself to others, sir, as the
22 architect of the deal and the lead person on the deal for
23 Lehman?

24 A. I might have at some point, yeah.

25 Q. And have you described yourself as at the epicenter of the

1 deal, trying to steer it to a soft landing at Barclays?

2 A. I'm sorry, say that again.

3 Q. At the epicenter of the deal --

4 A. The epicenter?

5 Q. -- trying to steer it to a soft landing at Barclays.

6 A. Trying to steer it to -- I might have, yeah.

7 Q. And have you said to other people that you were thrust
8 into having to lead the bankruptcy filing and the sale to
9 Barclays?

10 A. Sounds very dramatic, but I probably might have said that.

11 Q. You think you might have said that? And one of the things
12 that you -- despite being a shepherd or a quarterback or an
13 architect or the leader, your role essentially, sir, was
14 reviewing the asset purchase agreement at the -- in the
15 beginning of the week, yes?

16 A. No.

17 Q. You were not privy, for example, sir, to the work of the
18 people assessing the value of the securities being transferred,
19 isn't that right?

20 A. We each had different roles as the transaction sort of
21 took on a life. So I would say that at the very beginning we
22 were trying to construct a transaction structure, if you want
23 to call it that, in putting the whole thing together. I was,
24 I'd say, critical to that mission. And then as we got further
25 into it, different pieces needed to come together in order to

1 fill that out and to put meat on the bones. And, so, obviously
2 other -- you know, one person could not possibly, under the
3 circumstances, taken on all of that. So we had different
4 people in charge of different parts of that overall process.

5 Q. And with regard to the part of that overall process that
6 was assessing the identity and value of the securities to be
7 transferred, that was not one of the pieces that you worked on,
8 isn't that right?

9 A. Corre -- well, I worked only on helping other people
10 identify, like Barry Ridings, understanding what we were trying
11 to accomplish and getting him the diligence. But I was not
12 personally involved in selecting securities or negotiating
13 which securities were in or were out, correct.

14 Q. And you were not involved in any internal valuations of
15 the securities? You were not privy to a good chunk of what was
16 happening on that front, other than the fact that Bart had
17 people working on it, isn't that right?

18 A. Bart had people working on it. I would hear conversations
19 from Jim Seery, who would give me an update on what was
20 generally going on, you know, depending on the day, of course,
21 or the hour. But I was not personally involved in valuing
22 securities, no. That's not the nature of my expertise.

23 Q. That was the work of people like Martin Kelly, is that
24 correct?

25 A. No, I would say that was the work of Bart and people on

1 the trading side. Really I'd say he was looking to different
2 desks, people who ran different desks around each different
3 type of security. Martin Kelly, based on the limited exposure
4 I had to him, was almost like an information guy; he, like --
5 he would get stuff for people. But he didn't -- I don't know
6 if he -- I don't think he has the expertise to be valuing
7 securities.

8 Q. Neither do you, right?

9 A. Nor do I.

10 Q. Okay. So, you understood that Seery, Kelly and Lowitt
11 were among those focusing on pulling together information about
12 the securities pool and giving it to Bart, the lead negotiator,
13 Barton McDade?

14 A. Yeah. Obviously, Bart was getting the information. He
15 was, obviously, getting it from multiple sources depending on
16 the nature of the security. There were different traders that
17 were in charge of different desks some of whom I met in the
18 course of those few days and some of whom I didn't. And
19 ultimately all that information flowed to Bart.

20 Q. Okay. And one of the places that information flowed to
21 was into a schedule that was put together of the assets to be
22 transferred and the liabilities to be assumed in the deal, is
23 that right?

24 A. There was a schedule that we created, if -- I think I know
25 what you're referring to but if you want to show it to me that

1 might be easier.

2 Q. Well, do you recall a schedule that was created by one of
3 your analysts, John Grenier?

4 A. Yeah. That sche --

5 Q. John Grenier was there with a laptop?

6 A. John Grenier was a second week first year analyst who had
7 barely, you know, gotten his feet on the ground and was asked
8 to, basically, be a scribe which he actually tried his best at
9 in a difficult circumstance for a young kid. And he was asked
10 to put -- take, effectively, a bunch of information and put it
11 onto his computer.

12 Q. Okay. Now, if you would take a look, sir, in the book
13 marked Shapiro Witness Binder, I've left you two, just put
14 aside for the one that just says Witness Binder and in front of
15 you the one that has your name on it. And if you would turn in
16 that binder, sir, to what's marked as Exhibit M-2. Let me know
17 when you're there.

18 A. Yeah.

19 Q. Is that the schedule that we've been talking about?

20 A. Yeah. This was the one that Berkenfeld initialed.

21 Obviously, this schedule had many iterations of it before this
22 initialed one.

23 Q. And you were not in the middle of drafting that piece of
24 paper?

25 A. I looked -- I was looking at the schedule on and off

1 depending on, you know, the hour, truthfully. Because,
2 basically, people in my team were working in this, George Mack
3 and John Grenier, so, they were coming to me showing me it and
4 then we lost control of it at some point during the middle of
5 the night.

6 Q. Would it be fair, sir, to use the words, "you were not in
7 the middle of drafting that piece of paper" to describe your
8 role?

9 A. Yeah. I think that's fair.

10 Q. Okay. The scribe who originally generated was not the
11 person responsible for signing. It was signed by a senior
12 executive at Lehman, yes?

13 A. The scribe was merely an inputter.

14 Q. And did you come to understand that this document marked
15 as M-2 served as the form of guidance for the transaction?

16 A. The origin of that document was that there was -- there
17 was actually a balance sheet of some sort that I don't
18 personally remember seeing but I had remembered being told that
19 there was a balance sheet, and what we were trying to do was
20 figure out, at the time, what we could sell to Barclays, so the
21 initial draft of that schedule, what came to be that schedule
22 was really just a list of what assets were on the balance sheet
23 that could potentially be sold to Barclays. That iterated and
24 got morphed into ultimately the schedule you're looking at.

25 Q. And the schedule we're looking at is the one signed by

1 Mr. Berkenfeld or initialed by Mr. Berkenfeld?

2 A. Correct.

3 Q. And the question I asked was if you had come at that point
4 to understand that this document served as some form of
5 guidance for the transaction?

6 A. Yeah. It served as a basis to try to identify which
7 specific pools of assets were being included in the deal.

8 Q. And one of the people we've talked about is Martin Kelly
9 who had a collection role for -- had a role in collecting the
10 data, gathering it together, and supplying it to Bart McDade
11 the lead negotiator, is that right?

12 A. As far as I know. You know, I don't know exactly what
13 Martin did that whole weekend but --

14 Q. Well, one of the things you don't know that Martin -- you
15 never had a conversation with Kelly about valuing the
16 securities on any basis other than Lehman's marks, is that
17 right?

18 A. I never had any conversation with Kelly about valuation
19 that I recall.

20 Q. So, one of the -- your understanding, sir, was that the
21 values that were reflected on this exhibit, M-2, came from
22 Lehman's book value, isn't that right?

23 A. I don't know exactly where that came from. That came from
24 someone who provided them to the people who put this data in.
25 I don't know exactly ultimately how it came to be that these

1 particular numbers were agreed to.

2 Q. Did you ask anybody at the time?

3 A. Not that I recall but it's going on two years now.

4 Q. And when you reviewed the APA, draft after draft of the
5 APA, did you look at it to see if there was a description on
6 the basis of the valuation of securities that were being
7 transferred?

8 A. Probably in reviewing the section on purchase assets I
9 looked at the section that said approximately seven -- book
10 value of approximately seventy billion. I do have specific
11 knowledge of remembering that I looked at that, yes.

12 Q. And when you read that definition of book value, it was
13 your understanding that that came from how Lehman's books
14 reflected on the date the agreement was signed?

15 A. No --

16 Q. Value of the securities and the long position, is that
17 right?

18 A. At the time I don't really remember exactly what I thought
19 you meant by book value to be honest. I just remembered the
20 words we used book value, I don't know exactly where they came
21 from. I do know, though, that in the course of the discussions
22 between the two firms, there was a disagreement as to
23 ultimately what the values of the securities were and
24 ultimately, you know, how they got to numbers I'm not exactly
25 sure. Because as you pointed out I didn't participate in most

1 of those discussions.

2 Q. Now, you, sir, read every -- every draft of the asset
3 purchase agreement, is that right?

4 A. I tried to.

5 Q. And, in fact, you considered reading every draft of the
6 asset purchase agreement to be a pretty significant
7 responsibility of yours, isn't that right?

8 A. I viewed myself as trying to make sure that we tried to
9 reflect the deal as best we could in the document.

10 Q. And that was a pretty significant role, wasn't it?

11 A. It was an important role in the context of what we were
12 trying to accomplish I guess.

13 Q. And one of the things you would do when you were reviewing
14 every draft of the APA, was to watch out for changes in the
15 wording of the APA, correct?

16 A. Well, obviously, if something got changed and it was
17 blacklined I'd look at it.

18 Q. And if it was written in by hand, would you look at that
19 too?

20 A. Well, if it was written in by hand I presume I would have
21 looked at it.

22 Q. And one of the things you mentioned to Mr. Boies on your
23 direct testimony is that you reviewed the sale motion, is that
24 right?

25 A. Correct.

1 Q. Do you recall that the exhibit of the asset purchase
2 agreement to the sale motion included handwritten
3 interlineations?

4 A. I don't recall but it could be true.

5 Q. Okay. And in any event, you reviewed the APA multiple
6 times, yes?

7 A. Correct.

8 Q. And let me ask you, sir, to turn in your book to --
9 actually, it's in the other book, the one marked witness book.
10 And if you would turn, sir, to Tab 9 in that book you'll find
11 behind that what's been marked as Movant's Trial Exhibit 7 --
12 Movant's Exhibit 7 in evidence, sir.

13 A. Okay. Looking at an e-mail?

14 Q. What I want you to tell us is if you've ever seen that
15 document before?

16 A. I was shown this document in connection with preparation.

17 Q. And prior to your preparation -- your preparation for your
18 deposition or your preparation for your testimony today?

19 A. I believe my preparation for my testimony today.

20 Q. Okay. And prior to the time that you saw it as part of
21 your preparation for your testimony today, you've never seen
22 that document before, isn't that right?

23 A. Correct.

24 Q. And you never had any conversations with Mr. Martin Kelly
25 about anything concerning an overall -- a five billion all-in

1 economic loss versus Lehman's marks as part of the transaction,
2 is that right?

3 A. No, I did not.

4 Q. And no one ever spoke to you about any concept of a loss
5 versus Lehman's marks as part of the structure of the
6 transaction is that correct?

7 A. I loss? No, I don't remember the word loss.

8 Q. A loss versus Lehman's marks, sir?

9 A. A loss versus Lehman's marks, no, I don't remember that.

10 Q. And when you reviewed the asset purchase agreement, every
11 draft of the asset purchase agreement, you -- and to compare --
12 you were doing that to compare it to the economic terms that
13 had been given to you of what the deal was, correct?

14 A. Not just for that.

15 Q. That was one reason, no?

16 A. Just the changes that were being made to make sure that
17 they were reflected -- reflecting what we were negotiating,
18 kind of, real time.

19 Q. Okay. And in simpler terms, sir, probably my fault in the
20 question, but one of the things you were charged to do or took
21 upon yourself to do was review the asset purchase agreement to
22 make sure that it accurately documented the deal, correct?

23 A. As best I understood it and under the circumstances,
24 correct.

25 Q. And at the time that you were performing this work,

1 reviewing the drafts of the asset purchase agreement to make
2 sure that it accurately reflected the deal, no one had ever
3 talked to you about an all-in economic loss versus Lehman's
4 marks, is that correct?

5 A. Correct.

6 Q. Now, in fact, sir, you found the asset purchase agreement
7 to be a reasonably straightforward contract, correct?

8 A. As these things go, yeah, I think so.

9 Q. Okay. And you would from time to time have conversations
10 with Mr. McDade about what you viewed as key issues with regard
11 to the language of the asset purchase agreement?

12 A. Yeah, we -- yeah, I mean, you know, I'd say that generally
13 speaking the president of a firm is not necessarily interested
14 in looking at every single word of a contract as you would
15 expect. He did, you know, obviously, look at the contract and
16 reviewed all the key points. We took him through them orally I
17 recall with Weil Gotshal who did, frankly, most of that, not
18 me. And so I believe that Bart fully understood the contract.

19 Q. Nobody from Weil Gotshal ever mentioned to you knowledge
20 or understanding of all-in economic loss versus Lehman's marks
21 being part of the structure of the transaction, is that right?

22 A. That wouldn't have really been relevant to the drafting of
23 the contract. What was relevant to the drafting of the
24 contract was how we were enumerating the assets that they were
25 purchasing and the liabilities that they were assuming and what

1 they were excluding from the contract. It wasn't about marks
2 or not.

3 Q. So, is that a no? Nobody from Weil Gotshal ever said that
4 to you or anything like that to you?

5 A. I guess it's a no.

6 Q. Okay. Now, you mentioned to Mr. Boies that the seventy
7 billion dollar number in the definition of the long position in
8 the asset purchase agreement came from the trading side from
9 the finance group, is that right?

10 A. That's my belief, yes.

11 Q. You were not involved in determining that number,
12 calculating that number?

13 A. No, I was not.

14 Q. And would you take a look, sir, at Exhibit M-1 in your
15 book. It's the asset purchase agreement again. And if you
16 would turn to page 6 just so we can get that --

17 A. We talking about the other binder now?

18 Q. Yes, sorry about that. And that's marked M-1 in your
19 book --

20 A. Yeah, I have it.

21 Q. -- the asset purchase agreement. And let's go back to
22 page 6 to the subsection (d) at the bottom, the definition of a
23 long position. You with me there?

24 A. Yeah, I'm with you.

25 Q. All right. And you understood that that clause of the

1 asset purchase agreement when you saw it to mean that the value
2 of those securities were based on Lehman's marks, is that
3 right?

4 A. I think as I said earlier, I believe that there was some
5 agreement, not sure whether it came straight out of Lehman's
6 marks or whether it was agreed between Lehman and Barclays but
7 basically there was an agreement on what the value of those
8 securities were which we tried to evidence by saying
9 approximately seventy billion.

10 Q. Now, you understood it to be the book value shown as of
11 the time the contract got signed at around 10:30 p.m. on
12 Tuesday, is that right?

13 A. Yeah, the contract was signed about that time so
14 presumably it would have been an agreement that took place on
15 or before that time.

16 Q. And you believed that the seventy billion dollars that's
17 referred to in there, at the time they were reviewing the APA,
18 you believed that the seventy billion dollars referred to there
19 was based on Lehman's book value, yes?

20 A. Well, that's what I just said. It was based on what
21 was -- what I believe to be at the time agreed to by the
22 parties on what book value was and that we had a seventy
23 billion dollar, approximately seventy billion dollar number
24 that was given to us to put into the contract.

25 Q. Okay. Would you take a look at -- in the book there, sir,

1 is your deposition transcript and I'll ask you turn to page
2 104.

3 A. Sure. Sorry, what exhibit am I looking at?

4 Q. The tab should say deposition transcript.

5 A. Is that in a different binder?

6 Q. Nope. It's that one. The Shapiro binder. Right there.

7 A. Yep.

8 Q. Okay.

9 A. Yeah.

10 Q. And if you would, sir, turn to page 104. And, in
11 particular, sir, I'll direct your attention to the question and
12 answer that begin at line 19 and continue through page 105 at
13 line 11.

14 A. Um-hum.

15 Q. I asked you this -- you were asked this question and you
16 gave this answer at your deposition.

17 A. Um-hum.

18 Q. Okay.

19 "Q. Okay. Let's go back to the seventy billion for just a
20 moment, were the value of those securities based on Lehman's
21 marks?

22 "A. Well, this says it has a book value, so I believe it was
23 based on Lehman's as Lehman has marked them as of the time that
24 this contract got signed which meant the contract got signed at
25 10:30 p.m. around --- on Tuesday and on the night of the 16th.

1 So, I'm presuming that on or about the close of business on the
2 16th, there was a view, and it does say approximately seventy
3 billion, so presumably there was a list that was taken that
4 they had, obviously, had different pools of security in, they
5 had the marks that Lehman had on those securities as of that
6 date, approximately, and that's presumably where this seventy
7 billion came from."

8 You see that sir?

9 A. I do.

10 Q. Was that testimony true when you gave it at your
11 deposition?

12 A. Yes.

13 Q. So, I'll ask you again, your understanding at the time
14 with regard to the description of a long position in the asset
15 purchase agreement it was based on Lehman's marks, correct?

16 A. Correct.

17 Q. And you didn't say anything at your deposition about any
18 agreed value with those marks. You talked about Lehman's
19 marks, right?

20 A. When I -- I guess when I say agreed values, Lehman,
21 obviously, had marks at the time as of, I guess, 10:30 that
22 night or probably the end of the business day that day. They
23 were in discussions with Barclays, I knew they were I
24 discussions. The end of the day I think that this seventy
25 billion dollars represents whatever it was that Lehman took the

1 position that its marks were at that point in time.

2 Q. And --

3 A. Whether that included any input from Barclays, I can't be
4 sure. I can only tell you if we got that number.

5 Q. In your experience dealing with 363 sales and financial
6 institutions, you've never before seen an incident where the
7 books and records of a regulated broker-dealer are kept as
8 relative conversations with an outsider, have you sir?

9 A. I'm not party to other books and records and other things.
10 I can only say that this was a very unusual set of
11 circumstances that we were facing.

12 Q. So, that's a yes, is that right? You never --

13 A. You want to restate the question?

14 Q. -- that you never saw the books and records of a regulated
15 broker-dealer kept in a manner that took input from an
16 outsider?

17 A. I've never seen the books and records of a broker-dealer
18 period.

19 Q. Well, let me ask you to turn to -- on this issue of where
20 Lehman's marks came from, let me as you turn to page 105 of
21 your deposition, sir, line 16 and it's a long answer. I'm
22 going to take you through line 25. We can read the rest if
23 you'd like, but.

24 "Q. Well, the seventy billion is based, as you said, on
25 Lehman's marks. Do you know whether or not in selling the

1 securities to Barclays whether different marks were used?

2 "A. No, these -- again as I recall, this seventy billion was a
3 rough approximation of the aggregate book value. You know,
4 based on Lehman's marks of the asset side of the deal, right.
5 And so I would say no there was no discount because, obviously,
6 it was a book value."

7 Do you see our portion of your --

8 A. Yeah, I do.

9 Q. Okay. Was that true?

10 A. If I said it I -- absolutely.

11 Q. Okay. And you were not aware at the time you were
12 reviewing the asset purchase agreement, sir, of any discount
13 given to Barclays off the amounts shown on Lehman's books. Is
14 that correct?

15 A. Discount to the asset side?

16 Q. Yes.

17 A. No, there was a difference between the asset side and the
18 liability side but there's no discount, if you want to call it
19 that, on the asset side.

20 Q. I'm just on the asset side for the moment, sir.

21 A. Yeah.

22 Q. In the seventy billion dollar asset description that we've
23 been talking about, at the time you were reviewing the asset
24 purchase agreement, you had no knowledge, did you, of any
25 discount from the amount shown on Lehman's books to the seventy

1 billion shown in the asset purchase agreement?

2 A. There was no discussion or anybody saying anything to me
3 about a discount, no.

4 Q. And you had no discussion with anyone about there being no
5 book value available on the 16th of September the date the
6 contract was signed, correct?

7 A. Can you ask -- repeat your question?

8 Q. You had no knowledge, did you sir, of a book value being
9 unavailable on the 16th of September the date the agreement was
10 signed, is that right?

11 A. No, I had no knowledge that it was unavailable, no.

12 Q. Now, you had discussions, did you not, sir, with
13 Mr. McDade at the time, at the time the transaction was being
14 negotiated and signed, you had discussions with Mr. McDade
15 about his conception of the structure of the deal, did you not?

16 A. I don't know if we had discussions with the conception of
17 the structure of the deal, we had discussions about what was
18 going on, we had discussions about specific points from time to
19 time, but we didn't have -- I'm not quite sure I totally
20 understand what you're asking.

21 Q. Well, it's my fault, I think, with the question again.
22 Let me give you some testimony that Mr. McDade gave in this
23 court. Mr. McDade in this hearing has testified:

24 "Q. Now, on the 16th, when this agreement was signed, did you
25 consider the transaction contemplated by the asset purchase

1 agreement to be an equivalent exchange of assets and
2 liabilities? A wash?

3 "A. Including all of the value of what was contemplated, yes,
4 approximately."

5 UNIDENTIFIED SPEAKER: Do we have a transcript
6 reference, Your Honor?

7 MR. GAFFEY: I beg your pardon, yes. That's --

8 THE COURT: I was waiting for that myself.

9 MR. GAFFEY: The April 26th trial transcript, Your
10 Honor, at page 184, lines 3 to 8.

11 THE WITNESS: I'm sorry, am I supposed to be looking
12 at that?

13 MR. GAFFEY: Steve, can we put that up on the screen?
14 Page 184, please lines 8 to 13, 9 to -- I beg your pardon, 3 to
15 8. All right.

16 BY MR. GAFFEY:

17 Q. All right. I put that on the screen, sir, and let me just
18 read it again, so it's fresh in your mind.

19 "Q. Now, on the 16th, when this agreement was signed, did you
20 consider the transaction contemplated by the asset purchase
21 agreement to be an equivalent exchange of assets and
22 liabilities? A wash?

23 "A. Including all of the value of what was contemplated, yes,
24 approximately."

25 Q. You see that testimony from Mr. McDade?

1 A. I do.

2 Q. You have no reason to disagree with that, do you sir?

3 A. If that's what was in his mind that's his conclusion.

4 Q. He was the principal negotiator of the deal?

5 A. He was the principal negotiator of the deal, correct.

6 Q. And when you took final guidance as to what the structure
7 of the deal was during the time you were reading the asset
8 purchase agreement and all its drafts, you would be governed by
9 Mr. McDade's views, wouldn't you?

10 A. Mr. McDade was governed by Mr. McDade's views. He was,
11 ultimately, the one who decided whether we should sign the deal
12 or not.

13 Q. All right. Mr. --

14 A. I was not a decision maker.

15 Q. -- Mr. McDade is the final decision maker. Are we making
16 this deal or not, yes?

17 A. Correct.

18 Q. And you are the restructuring expert who's looking at the
19 asset purchase agreement draft after draft, correct?

20 A. Correct

21 Q. And you are the asset purchase agreement -- you are the
22 restructuring expert looking at the asset purchase agreement
23 for the purpose of making sure it accurately reflects the deal
24 that the dealmakers made, correct?

25 A. I was one of a number of people, not just me.

1 Q. And you spoke to Mr. McDade among others about what the
2 terms of the deal were, what the intent of the deal was, yes?

3 A. Yes. And I can tell you that he and I never discussed the
4 notion of a wash.

5 Q. Okay. Now, you were actually involved in the prep of
6 Mr. McDade for the hearings on the 17th and on the 19th, is
7 that right?

8 A. More -- I'm just trying to remember, more on the 17th
9 which was really more about he had never been in a bankruptcy
10 court before so he was just asking me kind of general questions
11 about it. Weil Gotshal actually did the -- whatever prep he
12 did in advance of the hearings, but he just wanted my views on
13 kind of, like, oh, what's it like to be testifying. He'd never
14 done that before.

15 Q. Did you ever write to anyone that you were quote "prepping
16 the CEO"?

17 A. Yeah, I think because I was involved in talking to him
18 about getting ready for the hearing.

19 Q. And in your work with Mr. McDade both in connection with
20 the hearings and in connection with the documenting of the
21 deal, did you talk to him about the deal being a wash an
22 equivalent exchange of assets and liabilities?

23 A. No. Not to the best of my recollection. We never --there
24 was no discussion about wash, the word wash.

25 Q. Mr. Boies asked you on direct if this was a quote/unquote

1 "balance sheet deal". Do you recall that?

2 A. I think so, yeah.

3 Q. Okay. Taking a look at Mr. McDade's testimony, you think
4 he thought it was a balance sheet deal?

5 A. No, I don't.

6 Q. But you do agree, sir, that the primary negotiator for
7 Lehman thought it was an equivalent exchange of assets and
8 liabilities, a wash, yes?

9 A. What Mr. McDade said there is what Mr. McDade said and
10 that's his view, obviously.

11 Q. Okay. You were present at the sale hearing when
12 Mr. McDade testified, sir, is that correct?

13 A. Yes, I was.

14 Q. Yes?

15 A. Yes, I was.

16 Q. All right. And you did get involved to some degree with
17 preparing Mr. McDade for that testimony, correct?

18 A. As I said, the kind of preparation, if you want to call it
19 that, was really more him wanting to understand what it was
20 like to be in a bankruptcy court and then I think on Friday,
21 I'm just trying to remember, we just talked a little bit in his
22 office about what was going to happen at the courthouse that
23 afternoon.

24 Q. Now, Mr. Boies asked you too, sir, some questions about --
25 about the compensation agreement in the asset purchase

1 agreement. Do you recall that topic generally?

2 A. Yes, I do.

3 Q. Okay. And you -- you did not draft the provisions
4 concerning compensation of former Lehman employees that wound
5 up in the asset purchase agreement, is that right?

6 A. No, I was reading it. There were two lawyers who were
7 actually working on it in the hallway of the 32nd floor. It
8 was one -- a compensation benefits lawyer from Cleary and one
9 from Weil Gotshal and I was kind of standing, kind of hovering
10 with them because, obviously, it was a pretty important
11 provision and I wanted to make sure that people understood what
12 we were trying to accomplish and I wanted to make sure that the
13 senior executives of Lehman were properly conveying to me what
14 we needed to get into that provision.

15 Q. Okay. And one of the things you did at the time you were
16 reviewing every draft of the asset purchase agreement was to
17 make sure that those provision concerning compensation of
18 former Lehman employees accurately reflected the deal that was
19 made?

20 A. To the best I could, yes.

21 Q. Okay. And you recall the two billion dollar number that
22 Mr. Boies asked you about in connection with the compensation
23 piece?

24 A. Yes, I do.

25 Q. And do you recall that two billion dollar number came from

1 the one page asset schedule we looked at before?

2 A. Well, it didn't really come from there. It came from
3 Bart -- I think it came from Bart and Skip McGee, Bart McDade
4 and Skip McGee.

5 Q. Um-hum.

6 A. So, that's where it came from. It didn't necessarily come
7 from the schedule. The schedule evidenced whatever it was that
8 senior executives determined to be the right number.

9 Q. Would you take a look, sir, at the asset purchase
10 agreement, it's M-1 in our Shapiro book there, and turn to page
11 35?

12 A. Okay.

13 Q. You with me? And just for context, take a quick look back
14 at page 34, see where we are. We're in Article IX, employees
15 and employee benefits.

16 A. Yeah.

17 Q. All right. Now, back on page 35, sir, that section 9.1(c)
18 which Mr. Boies asked you about.

19 A. Yes.

20 Q. You see that?

21 A. I do.

22 Q. And you see that there's a reference in there to a
23 financial schedule. It's about five lines -- you see it there?

24 A. Yeah.

25 Q. Four or five lines down from the top?

1 A. Yes, I do.

2 Q. Financial schedule delivered to purchaser on September
3 16th and initialed by an officer of each of holdings and
4 purchaser?

5 A. Yes, I do.

6 Q. You see that? When you were reviewing the asset purchase
7 agreement and a redraft of it to make sure it was consistent
8 with the business terms, did you see that schedule?

9 A. You know, I'm not sure exactly what schedule that refers
10 to.

11 Q. Take a look, then, sir, let's keep our electronic finger
12 on that page, please, but let's also take a look at Exhibit M-2
13 in your book. That's the schedule.

14 A. Okay.

15 Q. Okay. Now, looking at M-2 in your book, sir, does that
16 refresh your recollection? Is that the schedule referred to in
17 your --

18 A. Now, that I'm seeing it, yeah, I think that comp number of
19 2.0 billion dollars was what they were referring to.

20 Q. Okay. Now, let's go back to paragraph 9.1(c) at page 35
21 of Exhibit M-1. All right. And it was the reference I showed
22 you to, a financial schedule. And we've agreed now, sir, that
23 M-2 is the schedule we're talking about here, yes?

24 A. I believe so, yeah.

25 Q. All right. And your understanding based on the language

1 of that clause is that the two billion referred to on M-2, the
2 financial schedule, is the amount intended by paragraph 9.1(c)
3 concerning bonuses, is that right?

4 A. That's right.

5 Q. All right. Now, no part of that two billion, sir, in the
6 agreement that you reviewed and reviewed included that
7 schedule in any way to severance, is that correct?

8 A. I'm not sure I understand your question.

9 Q. Well, let me try this another way. Go back to page 34 and
10 take a look at section 9.1(b) entitled severance. Do you see
11 that?

12 A. 9.1(b), okay.

13 Q. I'm sorry, it's not entitled severance, sir, but you can
14 see that it deals with the severance issue as well.

15 A. Can I read it?

16 Q. Absolutely. And with this question in mind, sir, you
17 agree with me that there's no reference to M-2, the financial
18 schedule in the severance portion?

19 A. I'll read it and I'll agree with you if I can read it.

20 Q. Okay.

21 (Pause)

22 A. So, to answer you, there is no reference in Section B to
23 the schedule, that's correct, there is no reference.

24 Q. So, it's fair to say, then, sir, that the schedule amount
25 refers only to the bonus provisions in 9.1(c) in the asset

1 purchase agreement that you reviewed and reviewed to make sure
2 it accorded with the business transactions, is that right?

3 A. Can you repeat your question one more time? I'm sorry, I
4 was reading --

5 Q. It's fair to say --

6 A. -- I was just reading paragraph (c), that's why I didn't
7 hear your question.

8 Q. Okay. My question, sir, is it's fair to say that the two
9 billion dollar item on the schedule that we saw before as M-2,
10 relates only to the bonus provisions in 9.1(c) and not the
11 severance provisions of 9.1(b)?

12 A. Well, there's clearly no reference to it in 9.1(b).
13 9.1(c) also talks about, you know, what would happen if
14 employees were terminated. And, obviously, there was a
15 provision we negotiated that would reduce the total amount in
16 the event that -- or reallocate, I should say, I guess, is the
17 better way to put it, reallocate the amount in the event that
18 certain employees were terminated. And, so, in terms of
19 paragraph (c) it principally relates to the bonuses.

20 Q. Okay. And do you see -- and there's no reference to it in
21 (b), the severance.

22 A. No, there's no reference of it.

23 Q. And you would have looked carefully at the time reviewing
24 draft after draft to make sure that it accorded with the
25 business terms to be sure that if a schedule should be referred

1 to in the provisions, it was referred to in provision, correct?

2 A. I guess my answer would be that this was all done very
3 quickly. Lawyers were drafting fast. We were reviewing fast
4 and we did the best we could. Was it the perfect contract?
5 Probably not.

6 Q. It was true, sir, that you were probably one of the few
7 people around that had the ability to make sure that not only
8 was the business deal being reflected but that also you felt
9 comfortable with the legal terms of the APA. That's true isn't
10 it?

11 A. To the best of my abilities, yes.

12 Q. And it's true that you viewed this as a pretty, you know,
13 significant responsibility that you had to the Lehman estate,
14 yes?

15 A. As I told you earlier, correct.

16 Q. And in light of the importance, the significance to that
17 responsibility and your expertise, sir, will you agree with me
18 that when you reviewed the contract even in the organized
19 chaos, that's something you did carefully to make sure in a
20 multibillion transaction taken to this court, it accurately
21 reflected the business deal?

22 A. To the best of my ability, absolutely.

23 Q. Now, Mr. Boies also asked you a few things about the cure
24 provisions, about what Barclays' obligations were with respect
25 to cure and I'd like to turn to that --

1 A. Sure.

2 Q. -- that topic, sir. It was -- I think you mentioned that
3 you -- well, let me first establish what you didn't do. You
4 did not yourself gather the numbers with regard to estimating
5 the potential cure liability that Barclays would assume. You
6 didn't put the numbers together, right?

7 A. I asked for those numbers to be put together on the basis
8 that Archie Cox and Michael Klein, but principally Archie Cox,
9 I believe, asked me -- one or both of them, I can't remember
10 actually because we were sitting together in that negotiating
11 session, myself and Mark Schaffer and the two of them and they
12 asked me when I said to them that they had to take on the cure
13 payments the asked me how much could that be. I said I have no
14 idea. And, so, I said let me see if we can figure out
15 generally kind of on an estimated basis what that might be.
16 And I then went and instructed someone who worked for me,
17 George Mack, who was a senior vice president at the time to go
18 to the finance staff and try to find out as a proxy for a cure
19 amount what approximately one month the payable number would be
20 excluding compensation for the firm.

21 Q. And I'm going to follow up on that in a minute but my
22 original question was a bit more basic, sir. You yourself did
23 not sharpen your pencil, take out a pad, and figure out the
24 number, right?

25 A. That's correct.

1 Q. Okay. And you asked Mr. Mack who worked for you to go see
2 somebody and have them figure out the money?

3 A. Correct.

4 Q. And Mr. Mack also -- he went to -- it was his own wedding,
5 yes?

6 A. Mr. Mack was getting married so he left in the middle of
7 that week.

8 Q. Now, you wanted a fair estimate of what Barclays would
9 pay. It was an estimate, but a fair estimate of what Barclays
10 would pay in cure amounts.

11 A. Yeah, again, I was asked to give them a sense of what that
12 number might be, because, obviously, to the extent that we were
13 asking them to potentially take on many of the contracts they
14 wanted a sense of what is it that we could have to pay for,
15 right. They needed to know what the total amount might be.

16 Q. And your best estimate of a fair estimate of what Barclays
17 would pay was in the range of one and a half billion dollars,
18 correct?

19 A. When you say "your", obviously, I got the number from
20 George. George got the number from the finance staff after he
21 spent some time and he spent some time we didn't just, like,
22 pick a number out of the air. He spent some time working with
23 them on what was the sort of snapshot as to what payables would
24 be for all of LBHI and LBI at any given point in time over the
25 course of the month which seemed to me to be sort of a fair

1 proxy for what the firm -- what someone might have to pay. And
2 the cure cost was presumably at any given time we have some
3 amount of accruals going on and so generally speaking it felt
4 to me like that was a swag or a very general way to kind of get
5 at it because there was no way for me to give them an answer
6 within a very short period of time that was going to be very
7 definitive.

8 Q. And so the task was to get a fair best estimate?

9 A. To get the best estimate we could under the circumstances.

10 Q. And one of the places you saw that best estimate was the
11 sale motion that you reviewed when it was submitted to the
12 Court.

13 A. Once we came up with the number, which was, I think, we
14 made it very clear that was an estimated number, then we used
15 that number as the potential amount up to which Barclays could
16 have to pay without any assurance that they actually would pay
17 it, all of it.

18 Q. Now, when you reviewed the sale motion, sir, did you
19 review it to make sure that that was accurately described to
20 the Court?

21 A. Yes, I tried to.

22 Q. All right. And, I think, you'll find that motion in the
23 book that Mr. Boies gave you behind Tab 15.

24 A. Okay.

25 Q. Hold on. And that's BCI Exhibit 11.

1 A. All right. I have it.

2 Q. And I'm going to direct your attention, sir, to page 6 of
3 the sale motion and, in particular, sir, to the bullet point
4 entitled assumption of contracts. It's the fourth bullet point
5 down under the section entitled purchase agreement. Are you
6 with me?

7 A. Yes, I am.

8 Q. All right. And that says "The purchaser shall have the
9 right but not the obligation to take assignment of contracts
10 and leases which are designated for assumption and assignment
11 by purchaser". And then continues, quote, "The parties
12 estimate that the cure costs associated with such assumptions
13 and assignments will be approximately 1.5 billion dollars." Do
14 you see that, sir?

15 A. I do.

16 Q. And you read that at the time to be an estimate to the
17 Court of what the cure costs associated with the assumption and
18 assignments would be, isn't that right?

19 A. I probably had a hand in drafting that specific sentence.

20 Q. All right. So, when you had a hand in drafting that
21 specific sentence, sir, you were careful to say everything you
22 could to the Court about what that 1.5 billion dollar item was?

23 A. Yeah, I think to -- there's two sentences there. One says
24 the purchaser shall have the right but not the obligation so
25 that makes it very clear to everybody that Barclays could take

1 all or it could take no contracts. Obviously, we believed that
2 they would be taking the lion's share of the contracts because
3 they were buying an entire business that they hadn't previously
4 operated.

5 Our estimate at the time, best reasonable estimate we
6 could come up with was an amount of 1.5 billion dollars.

7 Q. I'm going to take a small risk here, sir, and push back at
8 a bankruptcy lawyer in a bankruptcy court, but that first
9 sentence describes the mechanism that Barclays can -- might or
10 might not take contracts. That's the purpose of that first
11 sentence, yes? It has the right but not the obligation?

12 A. I don't know what the purpose is. It says what it says.

13 Q. Well, you had a hand in drafting it thought, right?

14 A. Yeah.

15 Q. Okay. When you had a hand in drafting it you wrote, "The
16 right but not the obligation to take assignment of contracts
17 and leases, right?"

18 A. Yes. And that sentence is meant to tell the Court
19 Barclays doesn't have to take everything, right?

20 A. Yeah.

21 Q. Okay.

22 A. They take whatever they choose to take.

23 Q. And then the second separate sentence says simply, quote,
24 "The parties estimate that the cure costs associated with such
25 assumptions and assignments will be approximately 1.5 billion

1 dollars", end quote.

2 A. Yeah, I think that you need to -- that sentence needs to
3 be read in both the context of the first -- in connection with
4 the first sentence. And as well there were other
5 representations made to the Court during the hearings and maybe
6 in other pleadings that that 1.5 billion dollar number could be
7 up to 1.5 billion dollars. It was an estimate. And it was our
8 best guesstimate, effectively, as to what Barclays might have
9 to pay in the event that it took on, you know, a substantial
10 portion of the contracts. But there was no guarantee,
11 certainly, that anybody who's a bankruptcy practitioner and,
12 you know, there were, obviously, a lot of sophisticated
13 bankruptcy practitioners around this transaction, knew that
14 that 1.5 billion dollar number was an up to number. It could
15 be smaller, frankly, it could have been larger. Truth is, we
16 told Barclays this was the number but I didn't have any
17 absolute assurance -- we didn't cap it, they didn't have a
18 provision that said that they wouldn't pay more than 1.5
19 billion and after that it was Lehman's responsibility. This
20 was open-ended as far as they were concerned. It could have
21 been 2 billion, it could have been 300 million; the number was
22 not clear.

23 Q. Just to help me find my way through the books there, you
24 seem fairly familiar with the record, can you remind me of
25 where we would look to find the part where the Court was told

1 this was an up to number?

2 A. My general recollection was that during the hearing when
3 Harvey Miller was talking about -- Harvey Miller and Lori Fife
4 were talking about things that they talked about the cure
5 costs. I don't remember exactly their words but that's what I
6 remember.

7 Q. All right. And I'm not going to -- their words are their
8 words, so I'm not going to ask that --

9 A. Yeah, in the transcript they say what they say.

10 Q. -- but I'm asking about sources of the statement. So,
11 there's Mr. Miller's statements in Court, yes?

12 A. Um-hum.

13 Q. And there's the sale motion, yes?

14 A. Um-hum.

15 Q. Yes?

16 A. I'd have to go back and look at all the pleadings that
17 were filed. I don't recall them all today.

18 Q. Okay. Let's see the ones you can recall. There's the sale
19 motion, you had a hand in drafting it, correct?

20 A. Correct, correct.

21 Q. Okay. And there's the asset purchase agreement that was
22 submitted with the sale motion, correct?

23 A. Correct.

24 Q. And there are the two hearings on the 17th of September
25 and the 19th of September, correct?

1 A. That's right.

2 Q. Now, prior to the issuance of the sale order, sir, are you
3 aware of any other mechanism for disclosure to the Court of any
4 qualification of that statement, "The parties estimate that the
5 cure costs associated with such assumptions and assignments
6 will be approximately 1.5 billion dollars"?

7 A. No. I would say all of the things you just described
8 would have been the basis for description and disclosure to the
9 Court.

10 Q. Now, one role that --

11 MR. GAFFEY: You can take that off the screen.

12 Thanks, Steven.

13 Q. -- one role that cure cost estimate plays, sir, was in
14 your negotiations with Mr. Lewkow of Cleary of the breakup fee,
15 is that right?

16 A. That's correct.

17 Q. And the negotiation of the breakup fee was as I understand
18 it from your testimony is somewhat vociferous negotiation?

19 A. Yeah, for a couple, you know, for an hour.

20 Q. Okay. And as always, the buyer wants a high fee and the
21 seller wants a low one, yes?

22 A. The best we could do, yes.

23 Q. Okay. And one of the arguments that you made in
24 connection with coming up with the right number to bring to the
25 Court was that you needed to be in the range of roughly three

1 percent of the purchase price, right?

2 A. Yeah, I told them that I didn't feel comfortable going
3 above three percent.

4 Q. Okay. And you understood from your experience as a
5 bankruptcy lawyer that something in the range of two to three
6 percent was about the range you wanted to aim at?

7 A. Down the fairway.

8 Q. Okay. And you used the 1.5 billion dollar estimate of
9 cure in these negotiations with Mr. Lewkow to drive your point
10 about the three percent breakup fee, correct?

11 A. Yeah. Mr. Lewkow -- Mr. Lewkow to the best I remember,
12 didn't seem to care much about how I was getting there. He was
13 basically saying he wanted more. That he wanted 250. He might
14 have even started higher; I don't remember. But he wanted a big
15 number that I didn't think was justified and that I didn't feel
16 that we could actually defend.

17 Q. By defend you mean get approval from the Court?

18 A. Yeah, of course. And be able to explain to the Court how
19 we arrived at that number. And, so, when I went back to him I
20 said, look, we have approximately 1.7 billion dollars, you
21 know, in -- call it the buildings, the data center and the
22 cash, right. I think it was 250, 1 billion and 450. So, that
23 was, like. 1.7 billion. We have another approximately 1.5 of
24 estimated cure costs. So, we have about 3.2 billion dollar
25 transaction. Three percent, we can get to a hundred million

1 dollars. I feel comfortable with that. I would recommend that
2 and I will give you twenty-five million dollars of expenses
3 since, you know, I understand you're going to be going out-of-
4 pocket on this. That's what I would be prepared to recommend.

5 Q. And, as you know, sir, the 125 was the number that was
6 brought to the Court as the proposed breakup fee, correct?

7 A. That's correct.

8 Q. And that was the number that was brought to the Court at
9 the first hearing on the 17th of September?

10 A. That's correct.

11 Q. And you were present at that hearing, correct?

12 A. Correct.

13 Q. And you heard Mr. Miller describe those numbers to the
14 Court --

15 A. Yes.

16 Q. -- when the Court asked about the overall value of the
17 transaction in connection with the request for approval of the
18 breakup fee, correct?

19 A. That's correct.

20 Q. And it was in that context that you heard Mr. Miller use
21 the 1.5 billion with regard to cure?

22 A. I don't -- I'd have to look at Mr. Miller's transcript to
23 know exactly what he said but I can tell you that it was pretty
24 clear to me that we told the Court that this was an estimate.
25 And the word "estimate" was used multiple places either orally

1 or in a contract or in a pleading.

2 Q. Was it clear to you at any point in the hearing, sir, that
3 the estimate the Court was given would lead someone to
4 understand it could be 1.5, it could be 0?

5 A. I think anybody who is an experienced bankruptcy person
6 which, obviously, Your Honor is and, obviously, the creditors'
7 committee people and the debtor, everybody who is around this
8 transaction, we're all highly competent bankruptcy
9 professionals all understood that an assumption of assignment
10 provision could lead someone to take all of the contracts. We
11 said it was an estimate. Had Barclays been forced to pay two
12 billion dollars that would have been the outcome, had Barclays
13 paid zero that could have been the outcome. I think that was
14 reasonably clear to me and I think it was reasonably clear to
15 most people.

16 Q. And it was reasonably clear to most people in the hurry up
17 chaotic circumstances where you did the best you could, right?

18 A. Absolutely.

19 Q. And you left it up to creditors and others to infer that
20 the number -- although it was said to be 1.5 could actually be
21 0?

22 A. You know, I don't think we left it up to people to infer
23 things. People had the opportunity to ask questions. I made a
24 full presentation to the creditors' committee professionals
25 right before we came down the Court and try to give them an

1 explanation for everything and they asked questions. I don't
2 recall specifically whether they asked me a question about
3 that. But certainly with the kinds of professionals that were
4 around this case, there would be no reason that people wouldn't
5 have the ability to understand that.

6 Q. And you don't recall going through the basis of the 1.5
7 billion dollar estimate for cure in those meetings, do you?

8 A. I don't recall.

9 Q. And you can't testify today that you said anything about
10 the basis --

11 A. I don't.

12 Q. -- let me finish the question, please, sir. You can't
13 testify today that you said anything about the basis for
14 arriving at that cure estimate in those meetings you've just
15 told us about, is that right?

16 A. To the creditors?

17 Q. Yes.

18 A. Not that I recall.

19 Q. Now, you mentioned a bit before, sir, the -- well, you
20 knew, sir, that the deal changed by Friday, correct?

21 A. Correct.

22 Q. And you knew that one of the reasons the deal changed was
23 the composition and the value of the securities that were being
24 transferred to Barclays, correct?

25 A. Amongst other things. There were, obviously, other

1 changes that were occurring in terms of what they were going to
2 buy versus what they thought they were going to buy on
3 Wednesday. but I would say one of the most important changes
4 that was happening was the fact that the composition of
5 securities that we originally believed we could deliver to them
6 was no longer available.

7 Q. And we talked about, or at least I did, composition and
8 value. There were changes in value, yes?

9 A. Well, by definition presumably if you change the
10 composition -- I guess it doesn't have to depend but,
11 obviously, there was a pretty drastic change in the composition
12 because of what was happening both from a market standpoint and
13 also from the fact that we literally didn't have title or
14 didn't -- couldn't say we had necessarily had title to some of
15 the things that were in the original pool because of being
16 blown out of positions and the like. And, so, therefore, you
17 know, from my vantage point, I think, I said earlier what was
18 important to me when we started the process was to see if we
19 could create a contract that would ultimately be able to be
20 closed upon. Actually, we weren't successful in that regard so
21 things had to change.

22 Q. Thinks had to change in the clarification letter?

23 A. Well, they had to change in the business deal first which
24 is then evidenced by the clarification letter.

25 Q. And one of the changes that you under -- or amongst the

1 changes that understood had happened by Friday was that a lot
2 of the securities, or most of the securities, were now residing
3 within a certain repurchase agreement, correct?

4 A. Can you repeat that question?

5 Q. Did you know about the repo at the time of the sale
6 transaction, sir?

7 A. Yeah, well, let's talk about what the repo meant because
8 there were multiple repos.

9 Q. Right. You understood that Barclays would wind up taking
10 over from the Fed a certain repurchase agreement the Fed had
11 with Lehman, yes?

12 A. Yes.

13 Q. You were not privy to those discussions directly, correct?

14 A. No, I heard about them from Jim Seery.

15 Q. And you never had a conversation with anyone at Lehman as
16 to what collateral was actually in the repo, isn't that
17 correct?

18 A. I did not.

19 Q. And although you knew there was a repo, you didn't know
20 what securities were in it, correct?

21 A. Correct.

22 Q. And you were not involved directly in anything regarding
23 the repo, correct?

24 A. Not that repo, no.

25 Q. For example, one thing you did not know when you attended

1 the sale hearing on the 19th was that during the afternoon of
2 the 19th the repurchase agreement was terminated by Barclays,
3 correct?

4 A. I did not know that, no.

5 Q. Now, in your experiences as a lawyer with Shearman &
6 Sterling and as a restructuring expert at Lehman, you had some
7 familiarity with the safe harbor provisions of the Code,
8 correct?

9 A. Yes.

10 Q. And one of them is Section 559 concerning terminated
11 repurchase agreements, correct?

12 A. Best that I recall. I haven't looked at that section in a
13 long time but --

14 Q. Okay. Nobody asked you to look at it at the time either,
15 right?

16 A. No.

17 Q. And no facts came to your attention that indicated you
18 ought to take a look at it to make sure whether the agreement
19 that was before the Court accurately reflected the deal the
20 parties were doing, correct?

21 A. Well, as you said, I was not party to the repo discussion
22 at all so no one would have had reason to ask me.

23 Q. And do you know when, sir, the fact of the repurchase
24 agreement was disclosed to the Court in connection with seeking
25 its approval of the sale order?

1 A. I don't know.

2 Q. As far as you know, the first time the assets and the
3 repurchase agreement are mentioned as part of the sale
4 transaction is in the clarification, is that correct?

5 A. I think I heard -- I think I remember Harvey Miller
6 mentioning something to it, something about it in the hearing,
7 but that's the extent of my recollection of it.

8 Q. So, if it's not in the transcript of the hearing on the
9 19th, we'll take that over your recollection, okay?

10 A. Yeah, obviously.

11 Q. Okay. Now, assuming that there's nothing by Mr. Miller
12 with regard to saying the assets we're transferring are the
13 assets in the repo.

14 A. Yeah.

15 Q. Do you know of any place where it was told other than the
16 clarification letter that that was so?

17 A. Not that I have personal knowledge of, no.

18 Q. And you at the time of the hearing, let's just put it at
19 the time you came into court so we have a pin put in it, by the
20 time you walked into court, sir, you had not seen or read or
21 drafted or heard of the clarification letter. Is that right?

22 A. As I said, the Friday afternoon in Bart's office there was
23 discussion about evidencing changes in the letter or in a
24 document. I don't remember it being called a clarification
25 letter. The first time I remember hearing of a clarification

1 letter per se was when Harvey got up during a recess and
2 started to explain all the changes that had occurred when the
3 deal was, frankly, occurring right up to the point where Bart
4 McDade arrived in court.

5 Q. And if I heard you before correctly, sir, after the sale
6 hearing you had a family event to go to in San Francisco over
7 the weekend, right?

8 A. That's correct.

9 Q. So, you went home to Connecticut, took a shower, got in
10 the car, went to Kennedy, jumped on a plane, went to
11 California?

12 A. Correct.

13 Q. Okay. And you don't come back until --

14 A. Sunday.

15 Q. Sunday night --

16 A. Sunday afternoon, late in the afternoon.

17 Q. Sunday afternoon.

18 A. Late afternoon.

19 Q. And did you -- went you got back did you review the
20 clarification letter?

21 A. No. When I got back -- I mean not that day. I asked for
22 a set of documents on Monday when I got into the office and I
23 got the clarification letter and I probably took a look at it
24 but, again, as far as I was concerned we completed the deal.

25 Q. That was my next question. By the time you saw the

1 clarification letter, the deal was already closed?

2 A. Correct.

3 Q. Do --

4 A. The deal closed on early Monday morning, I think.

5 Q. -- do you know who took up your role in reviewing draft
6 after draft of the agreements to make sure they were consistent
7 with the business terms?

8 A. I think there were a team of people that were, obviously,
9 still around. There was, obviously -- I didn't have a role,
10 per se, as the lawyer because I'm not a lawyer at Barclays and
11 I didn't purport to be. I was reviewing them in a business
12 context. Weil Gotshal, obviously, was the principal lawyer for
13 the firm outside counsel. Inside, we had Steve Berkenfeld and
14 you had Jim Seery and other people on the business side were
15 around.

16 Q. But you were probably one of the few people around that
17 had the ability to make sure that not only was the business
18 deal being reflected but also to be able to get comfortable
19 with the legal terms, right?

20 A. I was one of the few people who was trained as a lawyer
21 and also on the business side of Lehman.

22 Q. And no one asked you to take a look at this clarification
23 letter?

24 A. I, you know, I think that I was, you know, people realized
25 that I had pretty much killed myself for five straight days and

1 I had decided that this was an important family event. I felt
2 that the deal was pretty much done. It seemed like it was in
3 good hands and so I left and I was pretty much out of contact
4 most of the weekend. I think I might have had one or two e-
5 mails on Sunday before I left California but basically expected
6 that I'd get back and the deal would be closed.

7 Q. Just so I can move onto another topic, sir, is it fair to
8 say that you had no idea what the clarification letter said
9 until after the closing?

10 A. I -- the -- what was ultimately contained in the
11 clarification letter was described generally speaking in court
12 on Friday, but not -- I don't think every single piece of it
13 and, frankly, I was not terribly focused on the clarification
14 letter.

15 Q. Now, we spoke a few minutes ago, sir, about the valuation
16 of the collateral in the repo and I think I've heard you say
17 you were not involved in the process of evaluating it, yes?

18 A. No, I was not.

19 Q. And I take it too, sir, you don't know what process was
20 applied to come to a value?

21 A. In terms of which securities, the repo?

22 Q. Yes.

23 A. I don't know.

24 Q. Do you recall a number being given to the Court at the
25 sale hearing of 45.5 billion for value of the securities to be

1 transferred to Barclays?

2 A. I'd have to go back and look at the transcript. I
3 remember there were two numbers that were given.

4 Q. I beg your pardon, sir. I have that -- I just have that
5 wrong. I need to withdraw that question. I didn't mean 45.5,
6 I mean 47.4.

7 A. Okay. I remember two numbers. I remember forty-seven and
8 I remember forty-five.

9 Q. Okay.

10 A. Roughly.

11 Q. And did you know at the time what the constituent parts
12 were that added up to 47.4?

13 A. No. I think I surmised. This was only my own -- my own
14 view at the time that the -- she had contrasted it, I believe,
15 this is Lori Fife when she presented it to the Court, with the
16 seventy billion long position. So, I guess I had heard that
17 that was the corollary of the seventy billion that the forty-
18 seven represented the corollary of the long position.

19 Q. And at any point in connection with what you heard about
20 that number, you never heard that that number was derived from
21 the application of liquidation values to the securities, did
22 you?

23 A. Well, I didn't hear anything about how it was derived,
24 so --

25 Q. Now, one other thing you did in connection with the sale

1 hearing was -- well, you understood before the sale hearing
2 that Mr. Ridings was -- might testify about liquidation values,
3 is that right?

4 A. Yeah, he was as the investment banker and financial
5 advisor to the company I expected he would testify as to what
6 he believed the transaction represented from Lehman's
7 perspective.

8 Q. And one of the reasons Mr. Ridings, you understood, was
9 going to testify about liquidation values was to present
10 liquidation values as a lower worse alternative to the deal
11 that was on the table for approval, isn't that right?

12 A. Yeah. I think as he looked at the world and as he looked
13 at the deal, he was comparing the deal that was on the table
14 from Barclays with a possible liquidation scenario and what
15 that could mean for evaluation purposes of the assets that were
16 being transferred.

17 Q. Because the goal from a 363 side was to do better than
18 liquidation, yes?

19 A. That was one of the goals not the only goal. You know,
20 this transaction, obviously, had multiple goals. One was to do
21 the best job we could from a value standpoint, the other was to
22 create -- I think you used my word soft landing, a soft landing
23 for 10,000 employees who otherwise would have been terminated.
24 And the third was to avoid a calamity for the world economy
25 through a liquidation of Lehman's. So, I think, we all took

1 cognizance, frankly, of the fact that this was not your typical
2 straightforward sale of a widget company. We were dealing with
3 a very different animal.

4 Q. And even in that circumstance, sir, you understood that in
5 a 363 sale, you need to be able to tell the Court the
6 proposed -- the proposed value was better than the seller would
7 do in a liquidation?

8 A. Barry Ridings was trying to get a point of view as to
9 whether or not he believed that or not.

10 Q. And to your knowledge, some work was done between Lehman
11 people and Mr. Ridings to come up with liquidation values for
12 certain categories of assets?

13 A. I don't know, per se, exactly what he came up with. He
14 was given the opportunity to meet with different trader -- you
15 know, head traders let's call them, present scenarios under
16 which, I don't believe he actually as far as I recall asked
17 them, you know, what would have been in a fire sale liquidation
18 I think he was asked, or asking them, if I had to sell these
19 securities over the next few days kind of where would you --
20 where did you get to, what would you do?

21 Q. And the reason Mr. Ridings needed that information, he had
22 to sell the securities over the next few days, what price would
23 you get, was in order to be equipped to testify at the sale
24 hearing to what a lower liquidation value would be as opposed
25 to the deal that was on the table, correct?

1 A. I think that was one of the reasons. Presumably, he as
2 the advisor to the company had to let the management and the
3 board know also his view.

4 Q. And one reason -- one aspect of Mr. Ridings was going to
5 be describe liquidation values to show what would happen if the
6 deal did not complete, correct?

7 A. Yeah. I would say he wanted to understand -- again, as I
8 just said if they had to sell securities pretty quickly, again,
9 I can't define what that meant but I think he was looking at,
10 you know, a reasonably short time frame on a forced sale basis,
11 you know, what would happen?

12 Q. And just to go back to the phrase I used a moment ago,
13 sir, do you agree with me that one of the things that
14 Mr. Ridings was being prepared to do with this assessment of
15 liquidation values was so he could evaluate what would happen
16 if this transaction did not complete and what the potential
17 loss in value to the estate might be if a forced sale of these
18 securities were to take place?

19 A. Yeah, that sounds accurate.

20 Q. And it was for that reason liquidation values were being
21 assessed or calculated?

22 A. By him.

23 Q. Let me ask you, sir, to take a look -- sorry to run you
24 from book to book, the witness book that doesn't have your name
25 on it; does not have your name on it. If you would, sir, I'm

1 going to ask you to turn to Tab 14 which is a multi page
2 document and it is Movant's Trial Exhibit 147 in evidence. And
3 I'm not going to take you through the whole thing. So, I'm
4 going to ask you take a look at the last page. Page number 70.

5 A. It's the very last page. Okay.

6 MR. GAFFEY: Steve, can we have that on screen,
7 please?

8 A. This is the schedule here?

9 Q. Yes. Just before we get on screen, have you ever seen
10 that before?

11 A. Only in connection with preparation for this trial.

12 Q. Did you see it at or around -- I take it, then, you did
13 not see it at or around the time that the Court was being asked
14 to prove this one's --

15 A. I did not.

16 Q. And I take it, then, sir, you never had any conversations
17 with Mr. Seery about negotiations with Barclays to arrive at a
18 value of what price could you obtain if you sold the securities
19 quickly, in a hurry?

20 A. I did not.

21 Q. So, when you sat at the sale hearing on the 19th, sir, and
22 you heard the number 47.4 given to the Court, you had no
23 knowledge of any such activity taking place?

24 A. I had no knowledge of that what you just described, no.

25 MR. GAFFEY: Your Honor, may I just have one moment to

1 consult with my colleagues? I may be finished.

2 THE COURT: Surely.

3 (Pause)

4 MR. GAFFEY: Nothing further for Mr. Shapiro, Your
5 Honor. Thank you for your time, sir.

6 THE WITNESS: Thank you.

7 THE COURT: No questions from -

8 UNIDENTIFIED SPEAKER: No questions from me.

9 THE COURT: Any movants, redirect?

10 MR. BOIES: Yes, thank you, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. BOIES:

13 Q. I'd like to begin by asking about the comp or compensation
14 issue that you asked about by counsel.

15 A. Okay.

16 Q. And that connection he directed your attention to the
17 witness binder that you have with your name on it.

18 A. Okay.

19 Q. And Movant's Exhibit 1 which is the APA and he directed
20 your attention first to paragraph 9.1(c).

21 A. Yes.

22 Q. And then he directed your attention to Movant's Exhibit 2
23 and said this is that schedule. Do you recall that?

24 A. Yes, I do.

25 Q. Now, 9.1(c) talks about a schedule that is initialed by an

1 officer of both parties, correct?

2 A. Correct.

3 Q. Is Movant's Exhibit 2 initialed by an officer of both
4 parties?

5 A. I see -- I just see one SB initial, I don't see another
6 set of initials.

7 Q. Are you aware of any schedule like this that was initialed
8 by an officer of both parties as provided for in the APA?

9 A. I'm not aware, that's why I -- at the time when he asked
10 me the question before I wasn't quite sure which financial
11 schedule this referred to.

12 Q. Now, the reference on M-2 is to comp, do you see that?

13 A. Yes.

14 Q. It doesn't say bonus, it doesn't say severance, it says
15 comp, is that correct?

16 A. That's right.

17 Q. And at the time that you were working on the APA and on
18 this transaction, did you have an understanding of what was
19 encompassed within the term comp?

20 A. At the time my belief was that it was a combination of the
21 bonuses that they would pay and if into the extent that they
22 weren't paying someone a bonus because they were terminating
23 that person's bonus it would include severance for that person.
24 That was my recollection at the time.

25 Q. Now, Mr. Gaffney showed you some materials that related to

1 Mr. McDade's testimony at trial.

2 A. Yes.

3 Q. And I'd like to direct your attention to April 26th, the
4 official transcript, page 160.

5 A. I'm sorry, what tab should I be looking at?

6 Q. We're going to put it on the screen.

7 A. Okay.

8 Q. Because I know in advance what questions I'm going to ask
9 you but I don't know what questions he's going to ask you. And
10 if we could look at line 24 it says,

11 "Q. The other part of that question had to do with
12 compensation, sir.

13 "A. Right. Barclays also assumed a two billion compensation
14 liability with respect to the combination of the employee's
15 bonus process and the severance process."

16 Q. Do you see that?

17 A. I do.

18 Q. And as you testified to counsel, Mr. McDade was the lead
19 negotiator for Lehman, is that correct?

20 A. That's correct.

21 Q. And you agree with this statement that he makes?

22 A. Yes, I do.

23 Q. And let me direct your attention to what Mr. Miller said
24 at trial in the April 28th, 2010 official transcript at page
25 32, line 20. "In connection with the compensation, that also

1 was an estimate as to the possible exposure for Lehman
2 employees going over to Barclays who would either be terminated
3 or were entitled to bonuses. So, it was supposed to cover both
4 severance pay and bonuses." Do you see that?

5 A. I do.

6 Q. First, do you agree that compensation amount, the two
7 billion dollar amount, was an estimate? Do you agree with
8 that?

9 A. I guess it depends on what you mean by do I agree with or
10 was it an estimate? In other words, that two billion dollars
11 was supposed to be the number that they paid out for bonus and
12 severance in my mind.

13 Q. But it had been prepared by somebody other than you,
14 correct?

15 A. Oh, yeah, absolutely.

16 Q. And did you understand the person who prepared it was
17 trying to make an estimate value?

18 A. Yes. I believe that it was based on an accrual that had
19 taken place on the -- through the point of the year that we're
20 in plus -- and that was for, I think, a cash accrual plus the
21 equity portion which I think they hadn't accrued and I think
22 they made a general estimate as to the two billion being the
23 number.

24 Q. And nobody knew at that point in time how many of the
25 Lehman employees going over to Barclays would be terminated and

1 how many would stay, correct?

2 A. That's correct. Although -- and I think we wanted to make
3 sure that they didn't jip us, those of us who were staying, so
4 we had this reallocation that in the event that they terminated
5 a certain number of people that they would just have to
6 reallocate that portion of it to the remaining employees.

7 Q. And that covered, the two billion dollars, covered both
8 bonuses and severance pay as Mr. Miller and Mr. McDade say,
9 correct?

10 A. What they said is consistent with my understanding of the
11 deal, correct.

12 Q. Now, you were also asked some questions about cure. And
13 first, you were asked by counsel about this subject and you
14 said you thought the number was an up to number, do you recall
15 that?

16 A. I did.

17 Q. And he said, "Well, can you tell me where that might have
18 been said?" And you said "Maybe it was said at the hearing."
19 Do you recall that?

20 A. Yes.

21 Q. I'd like to ask you to look at Tab 3 in the book that I
22 originally gave you.

23 A. Okay.

24 Q. And this is a transcript of the September 19, 2008 hearing
25 that has been marked as BCI Exhibit 49A in evidence. You see

1 that?

2 A. I do.

3 Q. And I'd like you to turn to page 100 of the transcript.

4 And at the very top of the page, lines 1 through 4 --

5 A. Yes.

6 Q. --- it says, "Barclays is also assuming" and I believe
7 this is what -- this is Mr. Miller's statement in court,
8 "Barclays is also assuming the cure amounts relating to
9 contracts and leases that will be assumed pursuant to the asset
10 purchase agreement and that has a potential exposure, Your
11 Honor, of 1.5 billion dollars that he would testify to." Do
12 you see that?

13 A. I do.

14 Q. And did you understand that when Mr. Miller was talking
15 about potential exposure, he was talking about something that
16 was not certain?

17 A. Yes, that's what potential exposure meant. Obviously, it
18 could be up to or even, you know, in excess of 1.5 billion.

19 Q. Incidentally, counsel also asked you about this September
20 19th hearing where you said that you thought there'd been
21 reference to the repo. You thought that was maybe when you
22 heard about it and he asked you whether you could remember
23 whether that was actually mentioned at the hearing or not. Do
24 you recall that?

25 A. Yeah.

1 Q. While you've got this transcript in front of you, let me
2 ask you to look at page 63 and lines 16 through 22 where
3 Mr. Miller says, "Barclays, Your Honor, has extended the sale
4 to enable this extraordinary transaction and hopefully to be
5 consummated. Yesterday, as Your Honor has heard, Barclays
6 basically stepped into the shoes of the Federal Reserve in
7 connection with the primary dealer credit facility as to the
8 45.5 billion dollars Lehman borrowed last Monday and received a
9 collateral that Lehman had posted in connection therewith."

10 You see that?

11 A. Yes, I do.

12 Q. And does that refresh your recollection that Mr. Miller
13 did talk at the hearing about the repo facility?

14 A. Yeah, that is a reference to that repo, correct.

15 Q. Let me turn next to Tab 15 in the book I originally gave
16 you which is BCI Exhibit 11 and counsel asked you about
17 paragraph 14.

18 A. Yes.

19 Q. And the assumption of contracts.

20 A. Yep.

21 Q. And you remember you talked about these two sentences
22 here?

23 A. Um-hum.

24 Q. And do you believe that these two sentences taken together
25 are consistent with what Mr. Miller told the Court that is that

1 the cure estimate was an estimate of potential exposure?

2 A. Yes, I do. I mean it's clear what the intent was as far
3 as I'm concerned.

4 MR. BOIES: May I have just a moment, Your Honor?

5 THE COURT: Sure.

6 (Pause)

7 MR. BOIES: I have no more questions, Your Honor.

8 THE COURT: Any further questioning?

9 MR. GAFFEY: None from the debtor, Your Honor.

10 THE COURT: Well, as if on cue, it's lunchtime and
11 Mr. Shapiro is excused and we can take a lunch break.

12 (Witness excused)

13 THE COURT: I'd just like to ask counsel for Barclays
14 what to expect this afternoon?

15 MR. BOIES: Your Honor, this afternoon, we have two
16 video each about an hour a little bit less followed by two
17 witnesses, Mr. Ullman and Mr. Exall, both of them I think will
18 be quite short. We are then -- tomorrow we have two witnesses,
19 Mr. Rosen and Mr. King who I think will take a day probably,
20 maybe not the entire day. And then on Wednesday, assuming that
21 Mr. Rosen and Mr. King take the entire day, we would plan to
22 bring on Mr. Romain. Thereafter, assuming that that is all on
23 track, on Friday we would bring Mr. Klein. We then have
24 Mr. Lewkow and James who will probably -- the order of those
25 two will depend on exactly the point we reach them because

1 there's some witness availability issues with respect to them.

2 We have one witness, Mr. Raisler (ph.), who is out of
3 the country and we have by agreement with counsel slotted him
4 for September 7th.

5 THE COURT: Okay. That's your lineup for now.

6 MR. BOIES: Thank you, Your Honor.

7 MR. GAFFEY: On the depositions, Your Honor, and we
8 can do this after lunch, I just want to -- I would ask for a
9 couple minutes to be briefly heard because of the two
10 depositions that I understand are going to be played. I want
11 to get some guidance from Your Honor as to how you want us to
12 proceed with objections. I'm inclined to just find a way to
13 register them with the Court and then sit quietly while the
14 depositions are played rather than jump up. Except with
15 respect to one and that's the deposition of Ms. Leventhal to
16 which we object to it being played and I'd just like to make a
17 record of that before we begin the depositions this afternoon
18 if that's okay.

19 THE COURT: Why don't we deal with that after lunch?

20 MR. GAFFEY: Thank you, Your Honor.

21 THE COURT: And I'm assuming based upon the schedule
22 that's been announced that we can conveniently start at
23 2 o'clock.

24 MR. GAFFEY: Yes, Your Honor.

25 THE COURT: Fine. So, I'll see you back at 2.

1 MR. GAFFEY: Thank you, Your Honor.

2 THE COURT: Thank you.

3 (Recess from 12:34 p.m. until 2:03 p.m.)

4 THE COURT: Be seated, please. Before we start, on
5 the subject of scheduling I have learned that my half day on
6 Wednesday the 25th has gone away as an issue. I was supposed
7 to have a morning hearing. That means that I have the entire
8 day on Wednesday to devote to this and can start at 9:30 or any
9 other time that's convenient for the parties, and, hopefully,
10 that additional time will make it easier to fit some of the
11 witnesses that you have identified into the schedule for this
12 week.

13 UNIDENTIFIED SPEAKER: Thank you, Judge.

14 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

15 MR. BOIES: Our first deposition witness this
16 afternoon is Mr. Barry Ridings, and the Court has a binder
17 which contains in it a copy at the beginning of the transcript
18 pages that are going to be played, together with the exhibits
19 that are going to be referenced, in the back for the Court's
20 reference. And a copy of the doc is being furnished to
21 counsel.

22 THE COURT: Okay. Can I just ask just a very basic
23 question, which is why we're dealing with Mr. Ridings by
24 deposition as opposed to live in court, since his office in New
25 York and I would assume he's available to either cooperate or

1 be subpoenaed?

2 MR. BOIES: He could have been, Your Honor. We were
3 doing it this way just because it was more efficient. If the
4 Court wished to have him in --

5 THE COURT: No, no. That's fine. If there's no
6 objection to doing it by this method.

7 MR. GAFFEY: We have an agreement, Your Honor, which I
8 may have mentioned on one of our court days in the last phase,
9 that we have agreed that deposition testimony can be used. It
10 won't be objected to solely for the reason that a witness is
11 available otherwise. So I think Mr. Ridings' testimony would
12 fall within the ambit of that agreement.

13 THE COURT: That's fine.

14 MR. GAFFEY: I don't think the Leventhal deposition
15 falls within the ambit of that. But we don't object to
16 proceeding with Mr. Ridings by --

17 THE COURT: We can talk about the Leventhal deposition
18 at the time that we come to the Leventhal deposition. At the
19 moment I'm really raising the question because live testimony
20 always is more powerful than anything that's shown on video.
21 It may not be entitled to less weight simply because it's
22 video, but it's human nature to consider that if a witness has
23 not been called live who could have been called live that maybe
24 there's something about the witness that should be viewed as
25 being less vital to the case. That, obviously, is not a

1 conclusion I'm drawing in this instance. I'm simply saying
2 that it raises questions in my mind as to why certain otherwise
3 available witnesses are being used in this manner. But, having
4 said that, let's proceed and see what he has to say on his
5 video.

6 MR. GAFFEY: Can I just, Your Honor, raise briefly the
7 issue of objections, because this does relate to Mr. Ridings.
8 With regard to most of the depositions that I understand
9 Barclays is going to play, and that's really all but two of
10 them, our objections are minimal, really. But with respect to
11 Mr. Ridings and Ms. Leventhal, as to -- because of the nature
12 of the question we have interposed a fair number of objections.
13 Now, as I said, I don't want to interfere with Barclays'
14 presentation here by jumping up, unless Your Honor would prefer
15 that we deal with them as the questions come up. I'm prepared
16 to do that, because I have a binder with them marked. Or we
17 could, if I can simply say I will have objections to part of
18 this, I'd be pleased to proceed by saying I can submit them to
19 Your Honor and -- it's a bench trial. Your Honor can rule on
20 the objections after you've heard the testimony.

21 MR. BOIES: I think that is the most efficient way to
22 do it, Your Honor.

23 THE COURT: Fine.

24 MR. GAFFEY: Then I'm out of the way now, Your Honor.

25 THE COURT: And we'll hear all the testimony,

1 including the objectionable testimony, at once, and then we'll
2 see if we can ignore the objectionable testimony later.

3 MR. GAFFEY: Well, I will say with respect to the
4 objections for Ridings and Leventhal, there are a lot of them,
5 but they are of a theme. They have to do with asking for
6 opinion and relevance objections. It's not form. So if Your
7 Honor decides one of them, I'm either right or I'm wrong on the
8 basic approach I've taken with this.

9 THE COURT: Fine. Okay. Let's proceed.

10 (Video deposition testimony played)

11 MR. BOIES: Your Honor, for the record, the next
12 question is going to reference Deposition Exhibit 561-a. That
13 same document has been marked as Barclays' Exhibit 140. So
14 when you hear the reference to 561-a it's Barclays' Exhibit 140
15 that's being referred to.

16 THE COURT: Fine.

17 (Video deposition testimony played)

18 MR. BOIES: Your Honor, this document is Barclays'
19 Exhibit 133 as far as trial exhibits are concerned. So the
20 reference to 377-a as a deposition exhibit is the same document
21 as Barclays' Trial Exhibit 133.

22 THE COURT: Okay.

23 (Video deposition testimony played)

24 MR. BOIES: Your Honor, the next testimony deals with
25 Deposition Exhibit 563-a. For Your Honor's convenience and for

1 the record that document has been marked as Barclays' Exhibit
2 196 in this trial.

3 (Video deposition testimony played)

4 MR. BOIES: Your Honor, the next question will be
5 about Deposition Exhibit 20. That document has been marked at
6 trial as Movant's Exhibit 7.

7 (Video deposition testimony played)

8 MR. BOIES: Your Honor, the next testimony will be
9 about Exhibit 21, Deposition Exhibit 21, which has been marked
10 at trial as Movant's Trial Exhibit 28.

11 (Video deposition testimony played)

12 MR. BOIES: Your Honor, the next testimony will
13 concern Deposition Exhibit 564A which has been marked at trial
14 as Barclays' Trial Exhibit 436.

15 (Video deposition testimony played)

16 MR. BOIES: Your Honor, that completes the deposition
17 designations of Barry Ridings. And we're now up to the
18 question of the Leventhal deposition.

19 THE COURT: Well, shouldn't we deal with what
20 objections you have as to the testimony I've just heard?

21 MR. GAFFEY: Yes, Your Honor. I'm happy to do that
22 now. I can do that by page -- by page and line if that makes
23 sense. We have a marked up book. We always have a book that
24 will show where those objections are.

25 If I can approach, Your Honor?

1 THE COURT: Sure.

2 MR. GAFFEY: Now, Your Honor, the designations are
3 shown in here in two different colors only because there -- all
4 the designations were played, both Barclays' and ours. I think
5 theirs are blue and ours are yellow. What we've done is marked
6 the objections to the questions and answers that we'd asked for
7 rulings on. And the first of those is at page 9 starting at
8 line 10. And it continues through page 10 at line 25. And
9 that is where Mr. Schiller asked:

10 "During the course of that period, September 15th
11 through September 19th, did you reach a view as to whether
12 there was a realistic opportunity to sell the North American
13 business to any entity other than to Barclays?"

14 And in our view, Your Honor, Mr. Ridings is a lay
15 witness. And to call for -- and as you saw several times
16 during the deposition, to call for a lay opinion like that, we
17 believe is inappropriate.

18 We also think that his opinion as to such things as to
19 whether there was a realistic opportunity to sell to any entity
20 is also subject to a relevance objection and to a lack of
21 foundation based on the testimony that Your Honor saw.

22 THE COURT: I'm overruling that objection. I believe,
23 based upon my having observed Mr. Ridings both as a live
24 witness during the hearings that we've been talking about on
25 September 19th of 2008 and also my observation of him by

1 videotape this afternoon, I conclude that given his position as
2 the retained investment banker for Lehman Brothers during this
3 period of time that he's in a position to testify in respect of
4 the question that's been asked. What weight is to be given to
5 his opinion testimony or his fact testimony is a matter
6 ultimately for me to determine at the time of final judgment in
7 this matter. But I'm accepting the testimony notwithstanding
8 the objection. And the objection's overruled.

9 MR. GAFFEY: Thank you, Your Honor. That'll inform a
10 couple of my other objections. If I can just make them for the
11 record and I'll assume the ruling is the same.

12 THE COURT: That's fine.

13 MR. GAFFEY: We have the same objection with respect
14 to page 11, line 12 through line 23; page 12, line 9, through
15 page 13, line 4.

16 Now, the next line of objections, Your Honor, begin at
17 page 24.

18 THE COURT: Just so I can be clear. As to all of
19 these foundation objections, they're overruled.

20 MR. GAFFEY: Thank you, Your Honor. And as I said,
21 those objections are consistent with the first that Your Honor
22 ruled on. So we accept that ruling with respect to all of
23 them.

24 I'm now at page 24, line 9, through page 24, line 25.
25 And the question that Mr. Schiller put is:

1 "Does Barclays' statement on September 17th as
2 reported here by Reuters that it expected to record a multi-
3 million dollar acquisition gain on the transaction, is that
4 statement inconsistent in any way with your proffer and
5 testimony to the Court on September 19th?"

6 Our objections there, again, Your Honor, go to
7 relevance and also go to opinion and a lack of foundation in
8 this sense. That's a question for the Court to decide. There
9 are two pieces of record evidence. One is whatever this
10 Reuters article says. The other is what Mr. Ridings' proffer
11 was. And with respect to each question formulated that way.
12 And I can identify them by page and line. We object to the
13 introduction of that testimony because it calls for Mr. Ridings
14 to essentially invade the providence of the Court. It borders
15 on expert testimony in that regard.

16 THE COURT: I'm overruling those objections as well.
17 In fact, all that Mr. Ridings is being asked here is whether or
18 not, in his view as the witness who gave the testimony, there's
19 anything about the statements reported by Reuters on September
20 17th that he considers sufficient cause to change that
21 testimony. He responded that he mostly viewed as irrelevant
22 himself because it goes to issues of accounting under U.K.
23 accounting law. And I'll overrule those objections and take
24 the testimony for whatever it's worth which is probably not
25 very much.

1 MR. GAFFEY: Thank you, Your Honor. I think this one
2 falls in a slightly different category, Your Honor. I'm now at
3 page 40 beginning at line 23 and continuing through page 42 and
4 continuing through line 24. And in this line of questioning,
5 Mr. Schiller is showing the witness what was marked as
6 Deposition Exhibit 20. And I don't happen to have the trial
7 exhibit number. That's Movants' 7, Your Honor. Exhibit 20,
8 that's the subject of the questioning, is Movants' Exhibit 7.

9 And Mr. Schiller asked: "Is this document and what it
10 purports consistent with your understandings of the discussion
11 between the parties that week?" That and similar questions
12 that take a document in evidence and simply ask the witness to
13 give his opinion about it we think are objectionable and should
14 not be admitted.

15 THE COURT: I agree with you on this one. The
16 document has nothing to do with the witness. And his testimony
17 doesn't add very much, to my understanding, of what the
18 document means. And so, I'll grant you that objection.

19 MR. GAFFEY: Thank you, Your Honor.

20 Our next objection, Your Honor, is at page 48
21 beginning at line 23 and continuing through page 50 at line 20
22 where Mr. Schiller begins with the following question:

23 "Mr. Miller also proffered as your testimony that the
24 sales agreement between Lehman and Barclays that was before the
25 Court was 'the result of good faith negotiations'. Did you

1 believe that at the time?"

2 "A. Yes.

3 "Q. Based on everything that you know today, was this proffer
4 of your testimony in the Court on September 19th fair and
5 accurate?

6 The witness answers: "I'm struggling with 'fair'. It
7 certainly was accurate and attempted to be accurate."

8 And then the question: "Have you become aware of
9 anything since that hearing that has led you to believe that
10 the information you received from Lehman was inaccurate in any
11 way?"

12 The proffer of Mr. Ridings' testimony was obviously
13 proffered by Mr. Miller. It is what it is. It's in the
14 record. We think it's inappropriate and objectionable for the
15 witness to comment on the accuracy of his own testimony in that
16 sense both based on the record at the time and certainly based
17 on anything he has learned since.

18 THE COURT: I'll overrule that objection. I think
19 that most of what this proceeding is about goes to the
20 essential reliability of evidence that was presented to the
21 Court at the hearings held on the 17th and 19th through 20th of
22 September 2008. And Mr. Ridings is in a position to at least
23 give his view as to whether or not the proffer of his own
24 testimony remains, at least in his view, accurate and reliable
25 testimony. That doesn't mean that I'm not in a position to

1 disagree with him based upon the evidence presented during the
2 60(b) hearings. So I accept his own self-reflection of his
3 testimony as being relevant for his state of mind both at the
4 time that he gave the testimony and at the time of his
5 deposition but not necessarily probative on the essential
6 issues that are before the Court.

7 MR. GAFFEY: Thank you, Your Honor. And within that
8 line of questioning as well is, at page 49, starting at line
9 22, Mr. Schiller asked:

10 "Do you have any reason to believe that those at
11 Lehman who were dealing with Barclays that week were not acting
12 in good faith" and questions to that and continue through page
13 50 at line 20.

14 We don't believe Mr. Ridings is competent to offer an
15 opinion on the good faith of others. The questions don't call
16 for extrinsic evidence one way or the other as to what would be
17 evidence of good faith. They simply ask him to opine on the
18 good faith of other witnesses.

19 THE COURT: I'm going to overrule that objection
20 pretty much for the same reason that I overruled similar
21 objections this morning that went to the testimony of Mark
22 Shapiro along the same lines. People who were present at the
23 time dealing with these negotiations are entitled to their
24 individual perceptions as to whether or not they saw anything
25 that gave them reason to question whether or not the parties

1 they were dealing with were acting in good faith. That doesn't
2 go to the ultimate question of whether the parties were, in
3 fact, acting in good faith. But it goes to the state of mind
4 of people who were present. And I'm prepared to take that into
5 account in assessing the ultimate questions that are before the
6 Court.

7 MR. GAFFEY: Thank you, Your Honor. We had a couple
8 of others in there but, in light of Your Honor's rulings, I'll
9 not press them. And --

10 THE COURT: Fine.

11 MR. GAFFEY: -- that's it for Mr. Ridings. Thank you,
12 Your Honor.

13 THE COURT: Okay. Now, before getting to the
14 threshold question of the Leventhal deposition which, I gather,
15 is going to be an objection to whether or not I should hear it
16 at all --

17 MR. GAFFEY: Yes, Your Honor.

18 THE COURT: -- I'm going to suggest that we take an
19 afternoon break because it's just about 3:30. And we'll break
20 for ten minutes. And I look forward to the argument at just
21 about twenty to 4.

22 MR. GAFFEY: Thank you, Your Honor.

23 (Recess from 3:27 p.m. until 3:46 p.m.)

24 THE COURT: Be seated, please.

25 MR. GAFFEY: Robert Gaffey, again, Your Honor.

1 I rise briefly to address what we believe is the
2 impropriety of proceeding with Ms. Leventhal's testimony by
3 deposition.

4 We did, Your Honor, as I said, agree that solely on
5 the basis of the unavail -- of the availability of a witness
6 neither side would object to the introduction of deposition
7 testimony, and I should say that up front. But Ms. Leventhal
8 falls in a different category.

9 Ms. Leventhal's deposition was not taken during the
10 discovery period, which was quite long and there was plenty of
11 time to take her, and the role of the Fed in this case was
12 never a secret to anyone.

13 Instead, out of nowhere, Barclays decided to take Ms.
14 Leventhal's deposition purely and clearly for the purpose of
15 playing it rather than bringing her to trial. And we know that
16 because Mr. Schiller said so at the beginning of the
17 deposition. Where he says, at page 7, lines 2 through 6 to Ms.
18 Leventhal, "And I will ask you to address the Court from time
19 to time, because Judge Peck may be viewing this deposition as
20 opposed to live testimony so that we don't interrupt your busy
21 schedule."

22 Now, Ms. Leventhal is an assistant general counsel of
23 the New York Fed. And with all due respect to the position of
24 assistant general counsel of the New York Fed I don't think
25 that rises to the level of a sufficiently busy government

1 official sufficiently to warrant not proceeding with live
2 testimony. Especially, given the fact that she's clearly
3 within subpoena power, she works around the corner.

4 And given the fact that this was clearly designed to
5 be read so that Ms. Leventhal would not have to take the stand,
6 we object.

7 Now, I would agree that it would fall within the
8 agreement we've made with regard to proper discovery taken
9 during the discovery period, but not to afterthought add-ons
10 designed really I think as a strategic matter for trial. I
11 think Ms. Leventhal should come here. I think if the Fed
12 really does have something to add that she should testify to it
13 and be subject to a cross-examination in the court. And for
14 that reason, we object on the grounds that this is post-
15 deadline discovery for no good reason, and does -- and she
16 should -- she's available; she should come and testify.

17 THE COURT: But let me just understand a couple of
18 essential facts. When was the deposition taken? What
19 objection, if any, was made to the taking of the deposition by
20 the movants prior to the taking of the deposition? And what,
21 if any, reservation of rights was placed on the record of the
22 deposition with regard to this issue?

23 MR. GAFFEY: We preserved our rights in this regard,
24 Your Honor. I don't have it to hand, but I recall that we
25 wrote to Barclays -- I think I recall it. We wrote to Barclays

1 and said this. And, in any event, at the deposition my
2 partner, David Carden, said at the beginning, and this is
3 before the statement I just read, this is at page 6, lines 14
4 through 23, "Jonathan," addressing Mr. Schiller, "I'm sorry, I
5 don't mean to interrupt you, I was going to wait until the
6 opening statement. I just want to preserve the objection that
7 Hamish is quite aware of, maybe you aren't, that this is being
8 taken after the close of discovery and there have been an
9 exchange of e-mails on that. I just want to say that we still
10 do object to the deposition."

11 THE COURT: What date was the deposition taken?

12 MR. GAFFEY: The deposition was taken on April 14th,
13 2010, Your Honor. And discovery had concluded sometime in
14 March. This is not six months after. But my point is there
15 just was no reason not to -- not to go ahead with the
16 deposition of Ms. Leventhal when discovery was being taken. We
17 did reserve our rights with regard to this, and Your Honor may
18 recall that, as I said this morning, at the last session of the
19 trial when the topic of Ms. Leventhal's deposition came up I
20 rose and recorded our objection, again, at that point. So
21 there has been all summer to accommodate Ms. Leventhal's busy
22 schedule, and, yet, she is not here. So we would object on
23 that basis.

24 If her deposition does go forward by deposition we
25 have, as we did with Mr. Ridings, registered some objections

1 and I think it would be useful if I can give you an idea of the
2 nature of the objections.

3 Essentially -- and again, I'm commenting on the
4 deposition as a whole, and Your Honor will see and agree with
5 me, or disagree with me, but much of the objection -- much of
6 the deposition is devoted to eliciting from Ms. Leventhal, as
7 if she were the New York Fed, what its views are on whether or
8 not Your Honor should have approved the transaction. And
9 that's irrelevant. The Fed's views -- I mean, whatever is to
10 be thought in the executive branch, whatever the Fed thinks
11 they had an opportunity to come and say it, and her views about
12 this now, if, indeed, she speaks for the government, are
13 irrelevant. And I'll give you an example of the type of
14 question and answer that we're talking about.

15 This would be at page 49, starting at line 15 and
16 continuing through line 20. Actually, let me start at line 9.

17 "Q. You were asked a moment ago about my question to you
18 regarding whether there is a public policy interest in
19 protecting the finality of the sales, such as the sale of LBI
20 to Barclays, do you recall that?

21 "A. Yes, I do.

22 "Q. If I change that question to ask whether the Fed has a
23 policy interest in protecting the finality of sales, such as
24 the sale of LBI to Barclays, does that change your answer at
25 all?

1 "A. No."

2 And then further on, in connection with that line of
3 questioning, and now at page 50, line 4.

4 "Q. I showed you Exhibit 1, the APA, earlier in your
5 deposition?

6 "A. Uh-huh.

7 "Q. The APA disclosed to the Court, didn't it, what purchased
8 assets were, correct?

9 "A. Yes.

10 "Q. Did the APA disclose to Judge Peck purchased assets in the
11 transaction between Lehman and Barclays?

12 "A. Yes.

13 "Q. And did those purchased assets in the APA to your
14 understanding include all assets used in connection with the
15 business excluding the excluded assets?"

16 Now, there are factual matters that relate to the Fed
17 here, Your Honor. You've heard testimony about them. These
18 are not them. Whether the Fed has an opinion about the
19 finality of sale orders is as irrelevant I think as it gets.
20 And to ask Ms. Leventhal, although she is an attorney, for her
21 opinion as to finality or whether the Court should have
22 approved a transaction, or whether the Fed has a public policy
23 interest is not appropriate testimony.

24 I'm prepared -- I think, this is what I would go
25 through after we heard Ms. Leventhal, as I just did with Mr.

1 Ridings in the interest of continuity, so that I'm not raising
2 these questions out of context, by the context of the
3 testimony. But all told, this one is different. This is not
4 just -- we made an agreement for efficiency, but to bring in a
5 public official to come in and opine on videotape as opposed to
6 coming to the court and expressing their views with all that is
7 attendant to that we think is inappropriate. And we would ask
8 that her deposition be excluded. And that if they want her
9 they bring her to court to testify.

10 THE COURT: Okay. I understand that position and I'll
11 hear from counsel for Barclays with respect to the proper use
12 of the deposition testimony.

13 I'm just going to make a comment as it relates to
14 administration of the trial as a general matter. I suppose
15 part of the fun of going to court is surprise, but generally
16 speaking, the Court prefers not to be surprised. And I did not
17 know before this afternoon that there was going to be an issue
18 concerning either objections to the testimony of Barry Ridings
19 or now objection to the use of the deposition of Ms. Leventhal.

20 I have no problem dealing with these issues as they
21 arise, but given the fact that we had such a long break between
22 the end of the movants' case and now the first day of evidence
23 in Barclays' case, it might have been helpful to me to have had
24 perhaps a foreshadowing before today of these issues, because I
25 could have used some of my time last week to review the

1 designations of Mr. Ridings' testimony and have some better
2 opportunity to prepare.

3 Believe me, it's fun for me, I'm happy to be surprised
4 from time to time, but I'm just thinking that the case may go
5 more smoothly for everybody if we had fewer of them, at least
6 as they related to me.

7 MR. GAFFEY: I'm sorry, Your Honor, for that. I think
8 part of the disconnect here, and I will take the weight for
9 this, is we -- you may recall that when the movants concluded
10 their case we put depositions in. We were going to come in and
11 read them, and we were talking about how to go ahead, and
12 object or not object. And we resolved it by submitting.

13 THE COURT: I have that notebook.

14 MR. GAFFEY: Well -- and what we had from Barclays
15 until shortly before trial was a very long witness list. And
16 then it got to be a shorter witness list, and then a shorter
17 witness list still. It wasn't entirely clear. I take Your
18 Honor's point and I apologize for that.

19 THE COURT: And I'm not hitting it hard. I'm just
20 saying in the future it would be great if we had just a little
21 bit more than a few minutes' notice that we're going to have an
22 issue.

23 MR. GAFFEY: I will say this. With regard to what I
24 think are the depositions that my friends are going to play
25 next week; Mr. Miller, Mr. Marsal, and some others, we -- in

1 the book that I have given Your Honor today we have annotated
2 those objections that we do have. Although -- and as I said a
3 while ago, it's really Ridings and Leventhal where we've got
4 anything of any significant amount. For example, we have no
5 objections to playing -- hearing Mr. Miller again. And
6 whatever objections we have to the others they are minor.

7 THE COURT: Okay.

8 MR. BOIES: Thank you, Your Honor. One of the
9 thoughts that I had had prior to today, and I still think it's
10 a good idea, is that our objections or the objections to our
11 witnesses, be treated the same way that our objections to their
12 witnesses be treated, which is what we did and we submitted
13 them for the Court's consideration at the end of all the
14 evidence. That is, rather than taking them witness by witness,
15 like we did with Mr. Ridings, what we did with theirs is they
16 put in all their designations, we put in our objections, and
17 that's submitted to the Court. And the Court has the benefit
18 of having the entire presentation of our side to consider the
19 objections.

20 I'd actually thought that was what we were going to do
21 with our witness as well. I thought that was the agreement.
22 But if I'm wrong about that, I'm wrong. But I still think
23 that's a good way to approach it. But I just submit that for
24 whatever consideration the Court wants to give it.

25 THE COURT: Without getting into that, I think there

1 may be a distinction between the designation of dry transcripts
2 and the presentation of videotape in court, which is going on
3 the record, and the public has an opportunity to --

4 MR. BOIES: To hear it.

5 THE COURT: -- not only hear it --

6 MR. BOIES: Right.

7 THE COURT: -- but view it and react to it as if it's
8 live testimony.

9 The Leventhal objection seems to me --

10 MR. BOIES: That's different.

11 THE COURT: -- to be a in a different category
12 altogether.

13 MR. BOIES: Absolutely. Your Honor, Leventhal is
14 entirely different, and we did understand that they had that
15 objection. That's entirely separate, and that's really what I
16 rise to address.

17 MR. GAFFEY: Excuse me one second. I can say, David,
18 and Your Honor, with respect to the rest of the -- we're
19 absolutely happy to do it the same way.

20 MR. BOIES: Right.

21 MR. GAFFEY: Have the objections, minimal as they are,
22 ruled on later.

23 MR. BOIES: That's good.

24 MR. GAFFEY: We don't have to take Court time.

25 THE COURT: Fine.

1 MR. BOIES: I think that'd be terrific.

2 THE COURT: Let's do that so that the same pattern of
3 cooperation and collective action to minimize unnecessary time
4 in court with regard to objections will apply, both to the
5 Barclays' designations and to the movants' designations.

6 Now, let's just deal with this question of the
7 Leventhal deposition.

8 MR. BOIES: Sure. Ms. Leventhal's deposition was
9 taken on April 14th. We noticed it, we subpoenaed her. It was
10 beyond the discovery cutoff. We did it because the Fed repo
11 issue and the discount issue became increasingly obvious with
12 their final brief. It was going to be important issue. We
13 thought that there was a desirability of having her testimony.
14 We thought given her schedule, and she happens to be gone this
15 week, she'll be back I think next week, so it's not entirely
16 impossible to call her, but because of her schedule we wanted
17 to have her deposition available for the Court. And we made
18 very clear that we were taking that deposition so that we could
19 submit it to the Court.

20 The fact that we have that desire doesn't make that
21 deposition any less admissible. In fact, I think it makes it
22 more admissible than a normal discovery deposition. Because
23 what it does is it gives everybody notice that what you're
24 doing is bringing on a witness that you do plan to present to
25 the Court as opposed to simply the normal discovery situation.

1 So we have a agreement that you -- that we can play
2 depositions even when the witness is available. The only
3 question is whether that ought to apply to Leventhal just the
4 way it is applied to all of the witnesses that the movants have
5 brought. And we think it should. We don't think there's any
6 reason to make a distinction.

7 THE COURT: Okay. Frankly, as to both the Barry
8 Ridings testimony and the Leventhal testimony, I have much the
9 same reaction, totally consistent with the remarks that I made
10 before the video of Mr. Ridings' deposition was played earlier
11 this afternoon. And that is, while I understand the
12 stipulation of the parties to be, and there's nothing wrong
13 with it, that witnesses who are available within the subpoena
14 power of the Court and who work in New York City can still have
15 their testimony presented by video as opposed to appearing
16 live. I consider that to be less favorable a way to present
17 their testimony than having them present in court. There are
18 multiple reasons why I think that's so.

19 You can tell from simply looking at the Barry Ridings
20 testimony that virtually every question was objected to as to
21 form, and none of those objections really mattered.

22 Having a deposition taken with a video camera is, on
23 the one hand, both a little bit more off-putting than appearing
24 in court, but it's also much more informal. And I'm old school
25 enough to think that there's a difference when somebody is

1 sitting on the bench with a black robe on, when the public is
2 present, when there's an opportunity for a real-time
3 examination when the testimony truly counts. And that the
4 system was really designed for searching the truth of witnesses
5 who are appearing live, that's the preferred approach; that's
6 how the system works.

7 For that reason, I'm not real happy to have had to
8 spend the afternoon looking at Mr. Ridings' video as opposed to
9 looking at Mr. Ridings. We ended up spending time that I think
10 was somewhat unnecessary in respect of objections, although
11 they had to be lodged, and they had to be ruled on.

12 In the case of Ms. Leventhal, we have the added
13 problem of having a threshold question, which I am asked to
14 consider now without a single piece of paper alerting me to the
15 fact that this was an issue before this afternoon. In fact,
16 when I went out onto the bench this morning at 9:30 I did not
17 know who the first witness was. It so happens that I remember
18 Mr. Shapiro, we were both in practice years ago, and like many
19 other witnesses in this case, I know them. I know them because
20 I was -- before I was appointed to the bench, an active
21 practitioner in this market. And many of the witnesses; like
22 Mr. Miller, like Mr. Ridings, like Mr. Shapiro, like Mr.
23 Burian, like Mr. Despins, and I'm not leaving anybody out, I
24 don't think, are people with whom I have had something to do
25 over the years when I was the practitioner. I'm interested in

1 seeing them testify live.

2 Ms. Leventhal has appeared in this court in the Lehman
3 case. She appeared, if I recall correctly, at the hearings on
4 September 19. She has appeared on other occasions. She
5 provided a declaration which supported the settlement, which
6 is, on occasion, a subject of debate in these proceedings
7 relating to sixty-day. There's no reason why she shouldn't be
8 here.

9 Now, that having been said, there's also no reason
10 why, if the parties have agreed to the use of depositions in
11 lieu of live testimony, that the deposition transcript and
12 video can't be played.

13 My ruling on this in order to be consistent is that
14 I'll see the deposition transcript played as a video without
15 prejudice to the ability of the movants, if they feel that
16 there is anything about the testimony that's incomplete,
17 whether it requires supplementation to cause Ms. Leventhal to
18 appear as a live witness next week or whenever she can appear.
19 And I'm making this statement openly to everybody. I don't
20 want to see video when there's a witness who can be here in
21 person. I don't like it; I prefer that you don't do it. It
22 appears tactical and it's not going to help you.

23 So if you would like Mr. Ridings to also appear live,
24 please bring him in too.

25 I want to see both of them live. And if Barclays

1 would like to reconsider whether or not it wants to play this
2 video, you're free to do that too.

3 So my ruling is you can have it both ways, you can
4 play the video but I want to see the witnesses. You're not
5 going to have it one way.

6 Let's proceed any way you want. If you want to break
7 to think about how you want to proceed we can take a five-
8 minute break.

9 MR. BOIES: Your Honor, let me suggest, rather than
10 taking another break, that we proceed with Mr. Ullman, who is
11 our next live witness, who was going to follow the deposition.
12 And let us take into account Your Honor's comments, and confer
13 with the other side, and we'll try to work out something that
14 will meet with the Court's objectives.

15 THE COURT: That's fine. I mean, it's your case, Mr.
16 Boies, and this is obviously something that did not happen
17 casually. In other words, I am impressed with the quality of
18 lawyering that all parties have at their disposal in this case,
19 and recognize that virtually nothing here happens by accident,
20 except perhaps something I might do, because I haven't had as
21 much time to think about some of these issues as the parties
22 have.

23 If Barclays is of the view that it can best present
24 its case through deposition testimony played through a video,
25 and if there is no objection to that, except in the case of the

1 Leventhal deposition for reasons that have been argued, I'm not
2 going to step on the way you try your case. But what I am
3 telling you is, I think it's backfiring. And the fact that
4 we're spending this much time talking about it raises more
5 questions than I think you probably consider helpful for your
6 case. So that I really wanted to see Ms. Leventhal. And,
7 frankly, I really would have wanted to see Mr. Ridings
8 available for the kind of searching examination that every
9 other witness who had a major role in the case has had, up to
10 this point.

11 To the extent that Mr. Ridings has been given a
12 somewhat shorter opportunity to have his testimony presented by
13 means of video that hasn't served your cause as well, I think,
14 as having had him here for the soup to nuts presentation that
15 every other witness has had.

16 But let's proceed with the next witness.

17 MR. BOIES: Very well, Your Honor. We call Mr. Ullman
18 to the stand.

19 THE COURT: Mr. Ullman, good afternoon. Please raise
20 your right hand.

21 (Witness duly sworn)

22 THE COURT: Be seated, please.

23 DIRECT EXAMINATION

24 BY MR. BOIES:

25 Q. Good afternoon, Mr. Ullman.

1 A. Good afternoon.

2 Q. Would you tell the Court what your present position is?

3 A. I'm a managing director at Barclays Capital.

4 Q. And prior to the close of the transaction that is at issue
5 in this case, what was your position?

6 A. It was the managing director at Lehman Brothers
7 responsible for global clearance and custody operations.

8 Q. And can you explain a little bit what your role was at
9 Lehman Brothers in that position?

10 A. I was responsible for all of the clearance and settlement
11 activity of the firm's businesses, both customer and
12 proprietary activity.

13 Q. Now, did you have any role in negotiating the sale
14 transaction that's at issue here?

15 A. No, I did not.

16 Q. After the closing you joined Barclays, is that correct?

17 A. That is correct.

18 Q. And did you, after the closing, work with the SIPA
19 trustee's lawyer to facilitate the transfer of assets from LBI
20 to Barclays pursuant to the purchase agreement?

21 A. Yes. I worked with Mr. Frelinghuysen on the transfer.

22 Q. And this involved a lot of securities, a lot of value of
23 securities, correct?

24 A. It involved a lot of securities, yes.

25 Q. And transfer of billions of dollars of assets from LBI to

1 Barclays, correct?

2 A. That is correct.

3 Q. Now, you mentioned Mr. Frelinghuysen. During the period
4 of time we're talking about did Mr. Frelinghuysen actually have
5 an office at Barclays?

6 A. Yes. For the first couple of weeks Mr. Frelinghuysen had
7 an office in 70 Hudson, where our security operations was
8 located. He was directly across the floor from my office.

9 Q. And what is the reason why he was brought -- that is a
10 trustee's lawyer was brought to the Barclays' offices, and
11 given an office there?

12 A. He was brought there to help facilitate the transfer of
13 securities, customer and proprietary assets.

14 Q. Now, you draw the distinction between customer and
15 proprietary assets, did you discuss with the trustee's
16 representative, Mr. Frelinghuysen, both the transfer of
17 customer assets, and the transfer of proprietary assets?

18 A. Yes. During the -- with reference to a specific transfer
19 I would -- I did discuss with Mr. Frelinghuysen customer asset
20 transfers and proprietary asset transfers.

21 Q. And did you discuss with Mr. Frelinghuysen that the
22 customer transfers would go to a different account than the
23 accounts used for the proprietary transfers?

24 A. Yes. The settlement instructions -- the account that
25 you're referring to would be the settlement instructions. The

1 settlement instructions of customer assets were going to a
2 specific DTC account. Proprietary assets were going to
3 different DTC accounts. Yes.

4 Q. And did you tell Mr. Frelinghuysen which accounts related
5 to proprietary assets and which accounts related to customer
6 assets?

7 A. We would have had that discussion, you know, during the
8 course of me explaining why we were transferring -- well,
9 requesting a specific transfer.

10 Q. Okay. And with respect to each transfer was Mr.
11 Frelinghuysen and the trustee aware of the account to which the
12 securities were being transferred?

13 A. The accounts would have been included in the request to
14 Mr. Frelinghuysen, and then the onward request to DTC.

15 Q. So the request that was given would have shown whether you
16 were requesting a transfer to a customer account or a
17 proprietary account, is that correct?

18 A. Yes.

19 Q. Do you have a witness book up there? I think you do.
20 We're handing them out right now, you do not. But you do now.

21 A. I do now. Thank you.

22 MR. BOIES: May I have just a moment, Your Honor?

23 (Pause)

24 Q. Now, do you know a Mr. Blackwell?

25 A. Yes, I do.

1 Q. Can you identify for the record who Mr. Blackwell is?

2 A. Mr. Blackwell was my direct manager at Lehman Brothers.

3 Q. And did Mr. Blackwell also talk to Mr. Frelinghuysen?

4 A. Yes, he did. I arranged for Mr. Blackwell to meet Mr.
5 Frelinghuysen over at 70 Hudson Street.

6 Q. And what was the purpose of that meeting?

7 A. The purpose was to discuss the transfer of proprietary
8 noncustomer assets.

9 Q. And what was the result of that meeting?

10 A. The results of that meeting were the -- that we were going
11 to be given instructions on how to transfer noncustomer assets.

12 Q. And let me ask you to look in your binder at Tab 5. And
13 does this document have anything to do with what you were just
14 talking about?

15 A. Yes. This is an e-mail that was written by Mr.
16 Frelinghuysen as a result of his meeting with Mr. Blackwell.

17 Q. And this is from Mr. Frelinghuysen and it's to Mr.
18 Blackwell, and it shows copies to other people. First, Mr.
19 James Giddens, do you see that?

20 A. Yes, I do.

21 Q. And do you know who he is?

22 A. Yes, I do.

23 Q. Who is he?

24 A. He is -- works for the trustee, represents the trustee.

25 Q. And then the next one is James Kobak, and do you know who

1 that is?

2 A. Yes, I do.

3 Q. Who is that?

4 A. He also represents the trustee.

5 Q. And Christopher Kiplok, and do you know who that is?

6 A. Yes.

7 Q. And who is that?

8 A. My understanding he also represents the trustee.

9 Q. And this exhibit has two pages, the first is the e-mail,
10 and -- which says "Please see the attached letter which will be
11 necessary before the SIPC trustee can authorize the movement of
12 the positions discussed earlier, that are due as part of the
13 LBI/Barclays transaction." And then there's attached a form
14 letter, is that correct?

15 A. That is correct.

16 Q. And if you go to the form letter does this letter relate
17 to proprietary assets as opposed to customer assets?

18 A. Yes, it does.

19 Q. And how can you tell that?

20 A. It makes specific references to securities that were sold
21 to Barclays Capital. Customer assets would be transferred. I
22 also know it was in specific response to the meeting that they
23 had, which was to talk about the transfer of proprietary
24 noncustomer assets.

25 Q. Now let me ask you to look at Tab 6, which is Barclays'

1 Exhibit 517. And this is a series of e-mails. And the first
2 e-mail is an e-mail from you to Mr. Frelinghuysen, September
3 29th, 2008 at 3:21 p.m., correct?

4 A. That is correct.

5 Q. And this asks for the transfer of securities to a
6 particular DTC account, or accounts, correct?

7 A. That is correct.

8 Q. And those accounts are account number 074 and 7256,
9 correct?

10 A. That is correct.

11 Q. Were these accounts or either of them accounts that you
12 had previously identified to Mr. Frelinghuysen as accounts that
13 received proprietary as opposed to customer assets?

14 A. No, they're not.

15 Q. Which are these accounts?

16 A. The accounts on this e-mail, 5101 and 7256 represent the
17 DTC accounts. We were instructing the receipt of noncustomer
18 proprietary assets for Barclays. The customer assets that we
19 would instruct on would have been DTC account 229.

20 Q. Okay. I may have misspoke, or you may have misheard. Let
21 me just be sure I'm understanding.

22 What was the account or accounts to which customer assets
23 were transferred?

24 A. Customer assets for PIM customers would go to DTC account
25 229.

1 Q. And DTC account 5101, do you know what that is?

2 A. Yes, I do.

3 Q. What is that?

4 A. That is a DTC -- Barclays/DTC account where they hold
5 equity securities.

6 Q. Equity securities that are customer securities or
7 proprietary securities?

8 A. Proprietary securities.

9 Q. Proprietary securities. And customer account 7256, is
10 that an account that holds customer securities or proprietary
11 securities?

12 A. It's a DTC account where Barclays was receiving
13 proprietary securities.

14 Q. And prior to this e-mail had you informed Mr.
15 Frelinghuysen that account 7256, for example, was an account
16 that received proprietary securities?

17 A. Yes, I had that discussion with Mr. Frelinghuysen on the
18 preceding Friday.

19 Q. Okay. So as you understood it, when you sent this e-mail
20 to Mr. Frelinghuysen, he understood that you were requesting
21 the transfer of proprietary securities, correct?

22 A. Yes, I --

23 MR. MAGUIRE: Objection, Your Honor. Asking the
24 witness to speak as to Mr. Frelinghuysen's understanding.

25 THE COURT: Sustained.

1 Q. When you wrote this e-mail were you requesting Mr.
2 Frelinghuysen to transfer proprietary securities?

3 A. Yes, I was.

4 Q. And did you believe that you expressed that to Mr.
5 Frelinghuysen in this e-mail?

6 A. Yes, I did.

7 Q. Now, Mr. Frelinghuysen then writes you back, correct?

8 A. That is correct.

9 Q. And that's an e-mail at September 29th at 3:31 p.m.,
10 correct?

11 A. Correct.

12 Q. And he says "Please confirm that the attachments to the e-
13 mail below represent assets of Lehman Brothers Inc. that were
14 sold to Barclays Capital pursuant to the asset purchase
15 agreement, dated as of September 16th, 2008." Do you see that?

16 A. Yes, I do.

17 Q. And the assets of Lehman Brothers are those proprietary
18 assets?

19 A. Yes, they are.

20 Q. And you then write back "confirmed," correct?

21 A. Correct.

22 Q. And were the assets then transferred?

23 A. Yes, they were transferred.

24 Q. And let me ask you to look next at Barclays' Exhibit 825,
25 which is behind the same tab behind that blue sheet. And this

1 is another copy of your September 29th, 2008 e-mail of 3:21
2 p.m., or on this one 3 p.m., twenty minutes and thirty-six
3 seconds, is that correct?

4 A. That is correct.

5 Q. Now let me ask you to look at Tab 7, Barclays' Exhibit
6 675. And this is an e-mail from Mr. Frelinghuysen, correct?

7 A. That is correct.

8 Q. And it is to a variety of people, but you get a copy,
9 correct?

10 A. Yes, I do.

11 Q. And what did you understand this e-mail to convey when you
12 received it?

13 A. This is an e-mail to DTC instructing them to deliver
14 securities from Lehman's participant account 074 to Barclays'
15 DTC account 5101.

16 Q. And the Lehman Brother DTC account 074, was that an
17 account that held Lehman proprietary assets?

18 A. Yes, it did.

19 Q. And the Barclays' accounts 5101 and 7256, were those
20 Barclays' DTC accounts that held proprietary assets?

21 A. Yes, they did.

22 Q. So what this was authorizing was the transfer of
23 proprietary assets from a Lehman proprietary account to a
24 Barclays proprietary account or accounts, correct?

25 A. That is correct.

1 Q. Let me ask you to look at Tab 9, this is Barclays' Exhibit
2 375. And this is a -- again, a document from Mr. Frelinghuysen
3 to a variety of people, and you get a copy of it, is that
4 correct?

5 A. That is correct.

6 Q. And this is dated September 26th, 2008 at 4:13 p.m., and I
7 guess at fifty-nine seconds after, a minute. With respect to
8 your conversations with Mr. Frelinghuysen, did Mr.
9 Frelinghuysen ever tell you that he did not believe that Lehman
10 had an obligation to transfer proprietary assets to Barclays?

11 A. No, he did not.

12 Q. Did you communicate with Mr. Frelinghuysen that you
13 believed that Lehman Brothers did have an obligation to
14 transfer proprietary securities to Barclays pursuant to the
15 APA?

16 A. Yes, I did.

17 Q. And did he ever disagree with that?

18 A. No, he did not.

19 Q. And did he, pursuant to your instructions, in fact
20 transfer proprietary securities to Barclays?

21 A. Yes, he did.

22 MR. BOIES: Your Honor, I have no more questions.

23 CROSS-EXAMINATION

24 BY MR. MAGUIRE:

25 Q. Sir, Bill Maguire for the SIPC trustee. It is, of course,

1 true, is it not, sir, that the vast majority of the assets that
2 were being transferred in the days and weeks after the closing
3 were all customer assets, isn't that right?

4 A. Yes, the majority of them were customer assets.

5 Q. And it is true, is it not, that in the course of your work
6 in connection with the transfers of assets you had many, many,
7 many conversations with Anson Frelinghuysen?

8 A. Yes, I had several conversations with Mr. Frelinghuysen.
9 We didn't have as many transfers as we had conversations.

10 Q. It's true, is it not, sir, that you had, on the subject of
11 transfers, many, many, many conversations with Anson
12 Frelinghuysen?

13 A. I had several conversations with Mr. Frelinghuysen, yes.

14 Q. You're not quibbling about the use of the description
15 "many, many, many conversations"?

16 A. No, I'm not.

17 Q. And of all of those conversations there are three that you
18 believe related in some way to transfers concerning noncustomer
19 property?

20 A. That is true.

21 Q. The first one of those conversations was one in which you
22 testified earlier you introduced Alastair Blackwell to Mr.
23 Frelinghuysen, isn't that right?

24 A. That is correct.

25 Q. Until that introduction all of the conversations, and all

1 of the transfers, and all of the work that you had done with
2 Mr. Frelinghuysen exclusively concerned transfers of customer
3 property, isn't that right?

4 A. We had not transferred any assets at that time.

5 Q. You were not even aware that there was any noncustomer
6 property that was to be transferred?

7 A. I was vaguely --

8 MR. BOIES: Can we have a time frame on that?

9 Q. At the time of the introduction, the introduction that you
10 testified earlier where you introduced Alastair Blackwell to
11 Mr. Frelinghuysen?

12 A. I was aware that there were noncustomer assets to be
13 transferred based on my conversations with Mr. Blackwell and
14 his request to meet Anson to discuss that.

15 Q. And prior to that revelation from Mr. Blackwell you were
16 not aware of any noncustomer property transfers, isn't that
17 right?

18 A. Prior to my conversations with Mr. Blackwell --

19 Q. Yes.

20 A. -- I might have been vaguely aware.

21 Q. If you could turn, sir, to page 70 of your deposition
22 transcript which I believe is in the binder in front of you.
23 And you'll see there at page 70, starting at line 7, you were
24 asked -- you gave the following testimony:

25 "Q. Okay, so your first conversation about the transfer of

1 noncustomer assets with Mr. Frelinghuysen is when you
2 introduced him to Mr. Blackwell, correct?

3 "A. That would have been the first time I was aware, as well,
4 that we were going to be making a transfer of noncustomer
5 assets."

6 Q. Do you see that testimony, sir?

7 A. Yes, I do.

8 Q. Was that true when you gave it?

9 A. Yes, it is.

10 Q. Does it remain true today?

11 A. Yes, it does.

12 Q. Now, sir, you explained to Mr. Frelinghuysen who Alastair
13 Blackwell was, did you not?

14 A. Yes, I did.

15 Q. And you told him that Alastair wanted to talk to him about
16 the transfer of non-PIM assets, correct?

17 A. Noncustomer assets, that is correct.

18 Q. Non-PIM assets, isn't that correct?

19 A. No. I would have used the term "noncustomer assets".

20 Q. Would you mind, sir, please turning to page 63 of your
21 deposition. Then starting at line 9 you'll see you gave the
22 following testimony:

23 "Q. Tell me everything you remember about that, sir. Did you
24 tell Anson why you were introducing him to Mr. Blackwell?

25 "A. I -- yes, I did. I remember explaining to Anson who

1 Alastair was and that Alastair wanted to talk to him about the
2 transfer of these non-PIM assets. Because I was dealing with
3 Anson on -- at that -- up until that point I was talking to
4 Anson about the PIM assets."

5 Q. Do you see that testimony, sir?

6 A. Yes, I do.

7 Q. You were asked that question and you gave that answer.

8 A. Yes, I did.

9 Q. That testimony was true when you gave it, was it not?

10 A. Yes, it is.

11 Q. Now, you had been talking to Anson about the PIM assets
12 and all of the PIM assets, of course, were all customer
13 property, isn't that right?

14 A. At that time I was talking to Anson about PIM assets. Up
15 until that point, that is correct.

16 Q. And that was all customer property, isn't that right?

17 A. And that was customer securities, yes.

18 Q. You had talked to him about some non-PIM assets, as well,
19 like prime brokerage assets, isn't that right?

20 A. That is correct.

21 Q. They're non-PIM assets, isn't that right?

22 A. They are customer assets that are not PIM.

23 Q. And there was also the matter of the PAM customers, right?
24 You'd been talking to Mr. Frelinghuysen also about the PAM
25 customers and their property, right?

1 A. I'm not sure exactly when I started talking to him about
2 that.

3 Q. The PAM customers, sir, I think you testified about at
4 your deposition at page 64. If you look just down at the
5 bottom of that page starting at line 22 you'll see you were
6 asked --

7 "Q. Did you have any discussions with Anson relating to the
8 transfer of securities for PAM, P-A-M customers?

9 "A. Yes, I did."

10 Q. And the PAM customers, sir, they, again, were non-PIM
11 customers, isn't that right?

12 A. They are non-PIM customer assets.

13 Q. But, again, all those assets are customer assets, isn't
14 that right?

15 A. Yes, they are.

16 Q. Now, having introduced Mr. Blackwell to Mr. Frelinghuysen
17 on the subject of this transfer of non-PIM assets, you were
18 not, yourself, physically present for the meeting that followed
19 between Mr. Frelinghuysen and Mr. Blackwell, isn't that right?

20 A. I wasn't present but I was very aware of what Alastair was
21 going to be speaking to Mr. Frelinghuysen about.

22 Q. But you did not accompany him to that meeting?

23 A. No, I didn't. I met with Mr. Blackwell immediately after
24 the meeting.

25 Q. And that introduction that you testified about that was

1 the first conversation that you had with Anson Frelinghuysen on
2 the subject of non-PIM transfers, isn't that right?

3 A. Yes. And in that context I would have referred to non-PIM
4 as proprietary assets.

5 Q. I understand that's your position, sir. My question is
6 that is the first conversation of the three in which you had
7 with Mr. Frelinghuysen that you believed related to the subject
8 of noncustomer assets, that is the first one, is it not?

9 A. That is correct.

10 Q. The second conversation that you had concerned a transfer
11 of some 269 million dollars in securities, is that right?

12 A. That is correct.

13 Q. And that transfer is the subject of the correspondence
14 that you were shown by your counsel in Tab 9 of your binder.
15 That is the Barclays' Exhibit 375, is that right, sir?

16 A. Yes.

17 Q. And that is an e-mail from Anson Frelinghuysen to various
18 people that you mentioned on direct that was dated Friday
19 September 26, 2008 at around 4:14 p.m.?

20 A. That's correct.

21 Q. And attached to this is a listing of assets in the amount
22 of something over 269 million dollars, is that right, sir?

23 A. Yes. Yes, it is.

24 Q. And accompanying that is the authorization and transfer
25 instructions from the trustee, is that correct, sir, at the

1 last page of the exhibit?

2 A. Yes, it is.

3 Q. And if we take a look at the last page of the exhibit
4 you'll see those instructions start with the words "James W.
5 Giddens, for the SIPA liquidation of Lehman Brothers, Inc., as
6 trustee for the SIPA liquidation of Lehman Brothers, Inc.,
7 authorizes the transfer of collateral referenced in the
8 enclosed spreadsheet in accordance with the wire instructions
9 below on an expedited priority basis as part of the transfer of
10 customer accounts to Barclays," do you see that, sir?

11 A. Yes, I do.

12 Q. Now, it was your understanding that these, in fact, were
13 not going to go to Barclays' customers. That, in fact, this
14 entire 269 million dollars was being received and obtained by
15 Barclays, not for customers but for Barclays' own proprietary
16 account, isn't that right, sir?

17 A. Yes, that's true. These were going to -- these were
18 proprietary positions being delivered to Barclays.

19 Q. Did you tell Mr. Frelinghuysen that the authorization that
20 had been provided here was mistaken and that, in fact, this was
21 not going to the customer accounts to Barclays, as set forth
22 here in the specific written authorization?

23 A. When I spoke to Mr. Frelinghuysen about this transfer my
24 focus was on the settlement instructions and expediting the
25 delivery of those. The settlement instructions, DTC Box 7256,

1 I had told Mr. Frelinghuysen is a proprietary box of Barclays.
2 He understood that, he didn't object when we had that
3 conversation. And we spent the rest of that discussion talking
4 about how -- or if there was anything we could do to get DTC to
5 expedite the delivery that day.

6 Q. You heard my question, did you not, sir?

7 A. I think so, yes.

8 Q. You understood my question?

9 A. Yes.

10 Q. Did you tell Mr. Frelinghuysen that these wire transfer
11 instructions were mistaken?

12 A. The wire instructions are accurate. The wire instructions
13 is to deliver from 636 to DTC Box 7256.

14 Q. Did you tell him there was any mistake anywhere on this
15 page?

16 A. No, I didn't. I would not have paid particular attention
17 to some of the language above that. My focus would have been
18 on the settlement instructions.

19 Q. So you never said Anson, why are you saying this is going
20 to customer accounts to Barclays, when it's my understanding,
21 and maybe if I wasn't clear, let me be clear now, that it's not
22 actually going to a customer account of Barclays, it's going to
23 Barclays' own account, you didn't say that to him?

24 A. I never pointed out why the language on this is
25 inaccurate. But I clearly explained to him that we were

1 delivering noncustomer proprietary assets to Barclays.

2 Q. Well, you can't actually tell us, sir, that you told Anson
3 Frelinghuysen that these assets were Lehman-owned assets that
4 were going to Barclays' own account, you can't say that, can
5 you, sir?

6 A. Could you repeat the question?

7 Q. You can't say that you told Anson Frelinghuysen that this
8 transfer was of Lehman proprietary assets that were going to
9 Barclays' own proprietary account, or its own account?

10 A. I can tell you that Anson and I discussed, and I discussed
11 with Anson that this delivery was going to -- because these
12 were noncustomer assets going to a Barclays' DTC box.

13 Q. Let me try again. You can't say that you explicitly told
14 Anson Frelinghuysen that these assets were Lehman proprietary
15 assets that were going to Barclays' own account for Barclays'
16 account?

17 A. Yes, I can.

18 Q. Would you turn, sir, to page 77 of your transcript.
19 Starting at line 8 you'll see you gave the following testimony:

20 "Q. Other than telling Mr. Frelinghuysen that you wanted this
21 269 million of securities to go to a different box at DTCC did
22 you tell him that these assets were Lehman-owned assets that
23 were going to Barclays for Barclays' own account?

24 "A. I can't explicitly say I said that. That said, I didn't
25 tell Anson where I wanted securities to go without explaining

1 to Anson or justifying why securities were going one place
2 versus another."

3 Q. And your answer continues.

4 MR. BOIES: And could we for context have the
5 remainder of the answer read, Your Honor?

6 THE COURT: What more do you wish to read?

7 MR. BOIES: Just the remainder of the answer, just the
8 next three sentences in the answer.

9 THE COURT: All right, let's do that.

10 MR. MAGUIRE: Certainly.

11 Q. For fullness:

12 "A. That said, I didn't tell Anson where I wanted securities
13 to go without explaining to Anson or justifying why securities
14 were going one place versus another. I had no authority to
15 move securities, only Anson had authority or the trustee had
16 authority to move securities. So, as a matter of course, I did
17 explain to Anson in every case that we were moving securities,
18 why, and for what reason."

19 Q. And if we continue reading the testimony for fullness,
20 sir, the following question is:

21 "Q. I appreciate that answer, sir. My question is a little
22 more specific than that. Other than what you believe you would
23 have done as a matter of course can you tell me if you have a
24 specific recollection of telling Mr. Frelinghuysen that the 269
25 million of securities that you wanted him to transfer on or

1 around the 26th of September were Lehman-owned assets that were
2 being transferred to Barclays for Barclays' own account?

3 "A. Again, I think I answered it. I said I can't explicitly
4 remember that I used those terms."

5 MR. BOIES: And can we have the rest of the answer
6 read, Your Honor? Where he then goes on to say "But, what I am
7 telling you."

8 THE COURT: Well, I guess one of the problems in
9 reading more is that it just keeps on coming.

10 MR. BOIES: All I'm asking is to have the com --

11 THE COURT: Originally all you wanted was the rest of
12 the original answer --

13 MR. BOIES: And then he read --

14 THE COURT: -- and now we're going into the rest of
15 the continuation, which was never really a part of the original
16 question.

17 MR. BOIES: Exactly. All I'm asking is a complete
18 answer.

19 MR. MAGUIRE: I'm happy to indulge --

20 THE COURT: Please do.

21 MR. MAGUIRE: I'm happy to indulge Mr. Boies.

22 THE COURT: At some point -- at some point we have to
23 stop this, though.

24 MR. MAGUIRE: We'll finish up with this, I think by
25 agreement.

1 THE COURT: I think I'm showing my general antipathy
2 to depositions.

3 BY MR. MAGUIRE:

4 Q. The question:

5 "Q. Well?

6 "A. But what I'm telling you is that in every case that we
7 transferred or requested a transfer of assets we were required
8 by Anson to explain to him why we were transferring it, where
9 they were going, and for what reason."

10 Q. And that is the testimony that you gave, is it not?

11 A. That is my testimony.

12 Q. And that is all in connection with this transfer of 269
13 million dollars, isn't that right?

14 A. That is correct.

15 Q. And it was with respect to that and every other transfer
16 that you were required to tell Mr. Frelinghuysen what the
17 transfer was and why it was being made, right?

18 A. That is correct.

19 Q. And it's with respect to that transfer that we have
20 Barclays' Exhibit 375, in which Mr. Frelinghuysen sent you the
21 instructions and authorization saying that this was being done
22 on an expedited priority basis as part of the transfer of
23 customer accounts to Barclays, correct?

24 A. That is -- that is what that says. But as I mentioned
25 that I did discuss with Anson and I did focus on the fact that

1 the DTC settlement instructions were those instructions for
2 noncustomer assets.

3 Q. And that's the second conversation that you believe you
4 had with Mr. Frelinghuysen on the subject of transferring non-
5 PIM assets, correct?

6 A. It is -- yes, it's a conversation I had with Anson -- Mr.
7 Frelinghuysen.

8 Q. And there is a third -- that you believe you had a third
9 conversation with Mr. Frelinghuysen that you believe you had on
10 the subject of transferring non-PIM assets, and that's a
11 follow-up conversation that you had with respect to that
12 transfer, right?

13 A. That is correct.

14 Q. To make sure that it had settled?

15 A. To make sure that we had the correct settlement
16 instructions and to determine what we needed to do or what we
17 could do to effect settlement.

18 Q. But in connection with that follow-up settlement
19 discussion you do not recall discussing the nature of those
20 securities as to whether they were customer or noncustomer?

21 A. The nature of the conversation or -- the conversation was
22 to discuss with him how to and to ensure we were effecting the
23 delivery of noncustomer securities. These were going to a
24 noncustomer or a Barclays' proprietary account.

25 Q. So it's -- well, let me ask you then to turn to your

1 deposition at page 80, starting at line 7.

2 "Q. And in this conversation with Mr. Frelinghuysen,
3 conversation number three, did you discuss the nature of those
4 securities as i.e., whether they were customer or noncustomer
5 assets?

6 "A. I don't remember if I would have mentioned that again.

7 "Q. Do you remember anything else about conversation number
8 three, sir?

9 "A. No, I don't."

10 Q. That was your testimony then, sir, was it not?

11 A. Yes, it is.

12 Q. And that was correct, was it not?

13 A. Yes.

14 Q. Now, sir, you were asked by your counsel to look at Tab
15 Number 6 in your binder, which I believe is Barclays' Exhibit
16 Number 517.

17 A. I have it.

18 Q. You have that before you?

19 A. Yes, I do.

20 Q. And that relates to another transfer, right? That's a
21 transfer of some 160 million dollars of securities, is that
22 correct?

23 A. That is correct.

24 Q. And you were asked whether you had a discussion with Mr.
25 Frelinghuysen with respect to that transfer, do you recall

1 that?

2 A. Yes, I do.

3 Q. And you were asked specifically whether you had told Mr.
4 Frelinghuysen whether this DTC Account 7256, that's referred to
5 in the body of this, was a Barclays' corporate account in which
6 proprietary noncustomer assets were placed, do you recall that?

7 A. Yes.

8 Q. And you said to Mr. Boies in your direct testimony that
9 you had that conversation with Mr. Frelinghuysen the previous
10 Friday, do you recall that?

11 A. Yes, I do.

12 Q. Now, in fact, sir, you don't know whether you even had a
13 conversation with Mr. Frelinghuysen about this transfer, isn't
14 that true?

15 A. About this particular transfer?

16 Q. Yes.

17 A. I don't know if I specifically had a conversation about --
18 about this transfer on Monday. But on the Friday we would have
19 talked about the fact that we were going to be transferring
20 noncustomer proprietary assets.

21 Q. So if you could turn, sir, to page 82 of your transcript,
22 starting at line 9 -- I'm sorry, at line 12.

23 "Q. Do you recall whether or not there was a conversation
24 about the 160 million, sir?

25 "A. I'm not positive if there was about the 160.

1 "Q. Do you recall any other conversations with Mr.
2 Frelinghuysen that you have not testified to already today
3 about the transfer of noncustomer assets from Lehman to
4 Barclays?

5 "A. No, I do not."

6 Q. And that testimony was true, was it not, sir?

7 A. Yes, it was. When I spoke with Anson on Friday regarding
8 noncustomer asset transfers I would not have referenced a
9 specific market value at that point. I would have not have
10 known exactly what we might be transferring.

11 Q. Now, sir, you never saw the asset purchase agreement or
12 the clarification letter, isn't that right?

13 A. That is correct.

14 Q. And you certainly weren't involved in any negotiations
15 concerning the letter agreement or contract that Barclays had
16 with the Depository Trust Clearing Corporation?

17 A. No, I was not.

18 Q. And you certainly don't have any personal knowledge as to
19 what assets actually belonged to Barclays and did not belong to
20 Barclays under any of those agreements?

21 A. No, I did not.

22 Q. Thank you, sir.

23 MR. MAGUIRE: I have nothing further, Your Honor.

24 THE COURT: Any redirect?

25 MR. BOIES: Yes, Your Honor.

1 REDIRECT EXAMINATION

2 BY MR. BOIES:

3 Q. Counsel showed you the portion of your deposition and
4 suggested to you that when you had -- when this conversation
5 took place with Mr. Hanson (sic) you were just talking about
6 non-PIM assets, do you recall that?

7 A. Yes, I do.

8 Q. And he directed your attention to page 63 at line 12, and
9 would you go there, please. And you had said that you were
10 talking about noncustomer assets, and he was suggesting that
11 you were only talking about non-PIM assets, do you recall that?

12 A. Yes, I do.

13 Q. Now, I'd like to direct your attention to the question and
14 answer that's immediately before the question and answer that
15 counsel read you. And that begins at line 12, on page 62:

16 "Q. Tell me everything you remember about those conversations
17 that you say happened?

18 "A. There were noncustomer assets that we were delivering away
19 for prime broker clients. We had very detailed discussions
20 around how those, and when I refer to noncustomer I'm referring
21 to, broadly, non-PIM customer assets. We had very detailed
22 discussions around prime broker assets and how those were to be
23 validated and effective, and also discussions with respect to
24 securities or assets that were being purchased by Barclays. I
25 specifically, specifically recollect and remember this because

1 at one point I introduced Hanson (sic) to Alastair Blackwell
2 on, I believe it was that Wednesday, after -- I believe it was
3 that Wednesday. I was asked -- I was introduced to Alastair to
4 Anson specifically so Alastair could have a conversation with
5 Anson regarding the transfer of these noncustomer assets."

6 Q. Did you give that testimony also, sir?

7 A. Yes, I did.

8 Q. Let me ask you to also look at page 135 of your
9 deposition. And particularly, lines 9 through 16. And this
10 follows a discussion about a e-mail of September 25th.

11 "Q. Was it shown to you at this time, sir, did someone print
12 it and show it to you?

13 "A. I don't remember how it was brought to my attention. It
14 was brought to my attention that Alastair, you know, as I had
15 mentioned, that Alastair had conversations with Anson regarding
16 the transfer of noncustomer assets. So in that context it was
17 discussed with me or shown to me."

18 Q. And did you give that testimony, as well, sir?

19 A. Yes, I did.

20 Q. Now counsel showed you Barclays' Exhibit 375, which is at
21 Tab 9 of your book. And showed you some language about the
22 transfer of customer accounts, do you see that?

23 A. Yes, I do.

24 Q. Now, he also asked you to look at Barclays' Exhibit 517,
25 which is behind Tab 6.

1 A. Yes.

2 Q. Do you see anything there about the transfer of
3 noncustomer -- I mean -- excuse me. Do you see anything in
4 Exhibit 517 about the transfer of customer assets?

5 A. No, I do not.

6 Q. There's no language here about the transfer of customer
7 assets, is there, sir?

8 A. No, there's not.

9 Q. And this talks about the transfer of assets of Lehman
10 Brothers Inc., is that correct?

11 A. Yes, this is specific language to transfer noncustomer
12 assets.

13 Q. And Exhibit 514, behind Tab 5. This is the September 25th
14 e-mail and the form letter that is attached, it is sent from
15 Mr. Frelinghuysen, specifically refers to the transfer of
16 assets of Lehman Brothers Inc. Is that correct?

17 A. That is correct.

18 Q. There's no mention here of customer assets, correct?

19 A. That is correct.

20 Q. And just one more. Exhibit 675, behind Tab 7. And this,
21 again, talks about the transfer of assets pursuant to the asset
22 purchase agreement, correct?

23 A. Yes.

24 Q. And there's no mention here of customer assets, is there,
25 sir?

1 A. No, there is not.

2 Q. And this was entirely a transfer of noncustomer assets,
3 correct?

4 A. That is correct.

5 MR. BOIES: Your Honor, I have no more questions.

6 MR. MAGUIRE: David?

7 MR. BOIES: Oh, excuse me.

8 THE COURT: Apparently you might have one more.

9 MR. BOIES: I might have. Your Honor, thank you.

10 No more questions, Your Honor.

11 THE COURT: Nothing more? All right.

12 You're excused. Thank you.

13 (Witness excused)

14 MR. BOIES: Our next witness is Mr. Exall. He will be
15 about the same length of time as the last witness.

16 THE COURT: Covering the same general subject matter?

17 MR. BOIES: No, a different subject matter but again,
18 it will be a relatively short one.

19 THE COURT: We're here; let's proceed.

20 MR. BOIES: Okay.

21 Mr. Paul Exall? The question is will he come.

22 MR. GAFFEY: Your Honor, one of my partners is going
23 to cover --

24 THE COURT: He may be excused.

25 (Pause)

1 THE COURT: Please raise your right hand.

2 (Witness duly sworn)

3 THE COURT: Be seated, please.

4 DIRECT EXAMINATION

5 BY MR. BOIES:

6 Q. Good afternoon, Mr. Exall.

7 A. Good afternoon.

8 Q. Could you begin by telling the Court what your present
9 position is?

10 A. I'm a director within the human resources department of
11 Barclays Capital. My title is head of compensation analytics
12 of Barclays Capital, Barclays Corporate and Barclays World.

13 Q. And could you speak into the microphone so we can pick
14 that up?

15 A. Sorry, is that better?

16 Q. Yes, thank you.

17 And in that position, could you generally describe your
18 responsibilities?

19 A. My responsibilities generally relate to assisting
20 management in the initiation, preparation, development,
21 agreement and eventual implementation of all and various
22 compensation strategies across those businesses.

23 Q. Now, you are familiar with the sales transaction that
24 brings us here -- familiar generally, correct?

25 A. Yes, I am.

1 Q. You were not involved in the sale negotiations, correct?

2 A. No.

3 Q. Did you come to New York at some point to do work related
4 to the sale?

5 A. Yes, I did.

6 Q. And when was that?

7 A. On or around the 22nd of September, 2008.

8 Q. And what was the purpose of your coming to New York?

9 A. Mr. Evans (ph.) requested that I come and assist him in my
10 general responsibilities but specifically in respect of the
11 sale and tracking and monitoring and modeling various
12 commitments that Barclays were taking on as part of the
13 transaction.

14 Q. And were you aware that Barclays had taken on certain
15 compensation or "comp" obligations under the APA?

16 A. I had seen a copy of the APA; I saw that there were
17 articles within the version of the APA that I had seen but I
18 had no specific understanding as to what Barclays' obligations
19 were, in fact, under that APA.

20 Q. Was it your responsibility to develop that understanding
21 or was that somebody else's job?

22 A. It wasn't my responsibility.

23 Q. I want to direct your attention to a conversation on -- I
24 believe there is evidence that you had a with a PWC auditor
25 whose first name is Mike and second name I have some difficulty

1 pronouncing but it starts with a G.

2 A. I think it's Mike Guarnuccio.

3 Q. Yes.

4 A. Yes.

5 Q. And meaning no disrespect to the gentleman, I'm going to
6 refer to him as "Mike".

7 A. Right.

8 Q. Did you have a conversation with Mike concerning the bonus
9 obligation that Barclays had under the APA?

10 A. I recall that we had a conversation at around the time --
11 around Barclays' overall compensation plans.

12 Q. And when would that conversation have been?

13 A. As I said, at around the time of my arrival in New York at
14 the beginning of my work. As I say, I can't be precise about
15 the dates. I could not find it in my diary.

16 Q. And at the time that you had this conversation with Mike,
17 did you have, yourself, an understanding of exactly what
18 Barclays' obligations were?

19 A. No, I did not.

20 Q. At the time of that conversation, if Mike understood that
21 you were telling him that Barclays was going to make a two
22 billion dollar payment for bonuses only, not other compensation
23 or severance but for bonuses only, what would your reaction be
24 to that?

25 A. Sir, could you repeat the question, please?

1 Q. Yes. If somebody told you that Mike believed that you had
2 told him that Barclays was going to pay two billion dollars for
3 bonuses only, not for other compensation aspects like severance
4 but for bonuses only, what would your reaction be to that?

5 A. I would be surprised at that. My immediate reaction would
6 be that he presume -- I believe he would have misinterpreted
7 the extent of my knowledge, or lack thereof, around the
8 obligations under the sale and the APA in general. And
9 misunderstood or inferred too much from the conversation that
10 we did, in fact, have.

11 Q. Now, after this period of time when you'd just arrived in
12 New York, did you ultimately come to understand what the two
13 billion dollar figure encompassed?

14 A. Not -- not in terms of Barclays' obligations under the
15 APA, no.

16 Q. Because that was not your responsibility?

17 A. No.

18 Q. Did PWC ultimately sign off on the accruals that Barclays
19 made in connection with the sales transaction?

20 A. Yes, I believe I did and that they signed the audit report
21 supporting the report of accounts at Barclays PLC of which that
22 was a part.

23 Q. And do you know, from your own personal knowledge, what
24 those accounting entries amounted to in terms of the bonus
25 amount that was being paid or accrued?

1 A. Not the bonus amount, no.

2 Q. Let me ask you to turn to Tab 3 in your book. And this is
3 Barclays' Exhibit 142A.

4 A. Um-hum.

5 Q. And can you identify this document?

6 A. Yes. This is the schedule that I was asked to prepare.

7 Q. And who asked you to prepare this?

8 A. Gary Romain -- Mr. Gary Romain who works in our finance
9 department.

10 Q. And what was the purpose of this being prepared, if you
11 know?

12 A. Gary asked me to prepare the schedule to track -- to
13 identify and track all compensation-related items in terms of
14 compensation delivered or planned to be delivered to former
15 Lehman Brothers employees in respect to their pre-acquisition
16 services.

17 Q. And when was this prepared?

18 A. We prepared several iterations of this throughout a period
19 of time. I don't recall precisely when we began this process
20 but it would have been -- I believe it would have been within
21 the period after -- obviously after the sale had took place but
22 I can't -- I can't be precise, unfortunately.

23 Q. Now, at the top, there are four columns. And the third
24 column says "Total Dollars in Millions". Do you see that?

25 A. Yes, I do.

1 Q. And under that there is something that says "OBS
2 Compensation Accrual". Do you see that?

3 A. Yes.

4 Q. And what does that represent?

5 A. That represents the opening balance sheet compensation
6 accrual.

7 Q. And this in connection with the APA, is that correct?

8 A. I was advised to use this by Mr. Romain.

9 Q. I'm sorry, what?

10 A. I was advised to use this as a reference point by Mr.
11 Romain for the schedule.

12 Q. And where it says "Source, APA"?

13 A. That was what he informed me.

14 Q. Okay. So he informed you that this was -- that the APA
15 was the source of this accrual?

16 A. Yes.

17 Q. And the amount of this accrual was two billion dollars, is
18 that correct?

19 A. That's what he informed me, yes.

20 Q. And did he inform you of all of the other numbers that are
21 here?

22 A. No.

23 Q. Who informed you of these numbers?

24 A. We -- as I mentioned, he requested that I track and
25 collate and aggregate up all items related to pre-employment --

1 pre-acquisition services performed by former Lehman Brothers
2 employees. These items came up as we -- as events unfolded and
3 I had a team of finance professionals and HR professionals that
4 supported me in generating the schedule.

5 Q. And I want to -- I want to go through them and ask you
6 about some of these specific items.

7 A. Okay.

8 Q. First, where it talks about "Pre-22/9 Payroll Items", do
9 you see that?

10 A. I do.

11 Q. What does that relate to?

12 A. Those were -- in substance there were two issues that --
13 that these were items that were paid for the -- to or for the
14 benefit of former Lehman Brothers employees in respect of a
15 pre-acquisition payroll -- or payroll-related item.

16 Q. And the next item says "Replacement RSUs", do you see
17 that?

18 A. Yes.

19 Q. And what does that relate to?

20 A. Those were cash awards that Barclays gave to former Lehman
21 Brothers employees to replace the lost value of bonus awards
22 that they had received earlier in 2008 from Lehman Brothers.

23 Q. So was this included as -- is that a bonus item?

24 A. I would categorize it as such, yes.

25 Q. The next item says "Bonus Including Social Tax". And what

1 does that relate to?

2 A. Those were all annual bonus awards made to individuals
3 that were in our compensation database as part of the 2008
4 compensation round at Barclays Capital.

5 Q. And these are bonuses for the ex-Lehman Brother employees?

6 A. Absolutely, former Lehman Brother employees, yes.

7 Q. And then the next one says "IBD Grad Programs", do you see
8 that?

9 A. I do.

10 Q. And what does that relate to?

11 A. Those were the annual bonuses payable to graduates that
12 were on our investment banking graduate program. But they were
13 former Lehman Brothers graduates that we obviously took on as
14 part of the acquisition.

15 Q. So these were also bonuses for the former Lehman Brothers
16 personnel?

17 A. Yes.

18 Q. And then the next two items are "Severance" and then
19 "Severance Payable in the Future", is that correct?

20 A. Correct.

21 Q. And all of these numbers related to the former Lehman
22 Brothers personnel, correct?

23 A. Yes, all the items on the schedule relate to former Lehman
24 Brothers employees.

25 Q. The next item says "Payroll Tax and Equity Compensation".

1 And what does that relate to?

2 A. Those are payroll taxes that we had estimated would be
3 payable on the granting of equity compensation awards to former
4 Lehman Brothers employees in respect to their pre-acquisition
5 service. It's derived from the numbers in the equity column on
6 the schedule and of -- you know, bonus-related in the sense
7 that they're directly linked to the bonuses reflected on the
8 schedule.

9 Q. So this was part of the cost of the bonuses, is that
10 correct?

11 A. Yes, it was.

12 Q. And let me just jump down near the bottom where it says
13 "Payroll Taxes on ISP Awards", you see that?

14 A. I do.

15 Q. And was that also a cost of the bonuses?

16 A. Yes.

17 Q. And then going back up to where it says "Acquisition
18 Buyout Investing Over Two Years", do you see that?

19 A. Yes.

20 Q. And what does that relate to?

21 A. That related to performance bonus awards that were due and
22 payable to an individual under his contract with Lehman
23 Brothers that Barclays matched as part of the acquisition.

24 Q. And was that, as with all of these amounts, amounts that
25 related to pre-acquisition services for the former Lehman

1 Brothers personnel?

2 A. Yes, absolutely.

3 Q. And you come down to a total spend of 1.951 billion
4 dollars, is that correct?

5 A. I see that there, yes.

6 Q. And it says "Balance left, cash basis forty-nine million
7 dollars", is that correct?

8 A. Yes.

9 MR. BOIES: Your Honor, I have no more questions.

10 THE COURT: Any cross-examination?

11 MR. GAFFEY: Your Honor, I have about an hour of
12 cross-examination for this witness. I don't know how you want
13 to proceed.

14 THE COURT: If you have an hour, I think we're going
15 to start tomorrow morning at 9:30 with this witness.

16 MR. GAFFEY: Okay, Your Honor.

17 THE COURT: And let me just ask again about what the
18 schedule for tomorrow will be after this witness.

19 MR. BOIES: Taking Your Honor's comments to heart, I
20 think we will see if we can arrange for Ms. Leventhal to appear
21 alive as opposed to playing her deposition. I don't know
22 whether that's going to be possible or not, but we're at least
23 going to explore that.

24 In the meantime, we're going to begin tomorrow with
25 Mr. Rosen followed by Mr. King after the completion, of course,

1 of this witness.

2 THE COURT: Okay, fine.

3 Anything more?

4 MR. GAFFEY: Your Honor, maybe now, maybe at some
5 point -- in our next phase, we're going to have experts. And
6 when we can get -- and we don't need an answer now but when we
7 get an idea of when it is Barclays will be finished -- we need
8 to schedule them. And rather than have them sit around and run
9 a clock, it looks to me as if Barclays is aiming to finish by
10 the 7th or so and then on the schedule that Your Honor gave us
11 there was the 10th, if needed, and then the 20th of September.

12 What I wanted to propose, if I could, is that it might
13 make sense to just decided now that the expert phase'll start
14 then and we can -- we can then know when these -- our experts
15 need to be here.

16 MR. BOIES: It's starting on the 20th?

17 MR. GAFFEY: Yes.

18 MR. BOIES: Yeah, I think that works, Your Honor.

19 The one thing I want to take an overnight to think
20 about is the implications of the Court's views in terms of the
21 remaining depositions that we were going to play. Because we
22 thought it would be much more efficient to do so, we had -- as
23 the movants had -- I mean movants offered a number of
24 depositions and we were planning to offer a number of
25 depositions as well.

1 THE COURT: Let me be clear. My comments were
2 particularly focused on two witnesses who I considered to be
3 important, witnesses who are both local and who have previously
4 physically shown up in court on multiple occasions; Mr. Ridings
5 and Ms. Leventhal. I'm not making a general statement designed
6 to either prolong or make more costly the presentation of
7 evidence that can be conveniently presented by means of
8 deposition excerpts. There reference is, as much as anything,
9 to my personal surprise that these two witnesses were being
10 presented by means of video deposition. And I took the
11 occasion of the objection made to the Leventhal deposition by
12 video to express a point of view, which is personal to me, but
13 by no means intended to alter trial preparation or trial
14 strategy for any party.

15 I did note, and I meant it, that because there was
16 obvious disagreement concerning the Leventhal deposition in
17 particular it appeared to be, as much as anything, a preference
18 of Barclays' not to have that witness present live which led to
19 the use of the deposition testimony which was opposed by
20 counsel for Lehman. That may not be the case and my
21 conclusions may be completely inapposite.

22 Nonetheless, it did provide an opportunity for me to
23 say that generally speaking having sat through, as I think I
24 expressed to all counsel at the outset, weeks and weeks of
25 video deposition testimony in the context of another major

1 trial a number of years ago, I have come to the conclusion that
2 the presentation of evidence by means of video is not optimal.
3 For any party. And it's certainly not optimal for me.

4 And so if anybody believes the testimony of a
5 particular witness is likely to be significant to the finder of
6 fact, and that witness is alive, cooperative or within subpoena
7 power, that witness should be here. Live. Because I will
8 necessarily assume that any witness who is presented by means
9 of deposition is viewed by the parties as ultimately less
10 significant.

11 Now, if you tell me I'm wrong in that, I'll certainly
12 give reconsideration to all of those designations I have in my
13 chambers. But I have concluded that every single one of those
14 designations ultimately is less important to me than anything I
15 hear here live. If you want to disabuse me of that, you don't
16 have to do that now. Okay?

17 MR. MAGUIRE: Thank you, Your Honor.

18 THE COURT: We'll see you tomorrow morning at 9:30.

19 (Proceedings concluded at 5:20 PM)
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I N D E X

T E S T I M O N Y

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C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true
and accurate record of the proceedings.

Clara Rubin

AAERT Certified Electronic Transcriber (CET**D-491)

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